

The
ANNUAL SURVEY OF AMERICAN LAW
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ANNUAL SURVEY OF AMERICAN LAW

*For what avail the plough or sail
Or land or life, if freedom fail?*

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This volume is dedicated to

EDWARD S. CORWIN

FOR HIS NOTABLE CONTRIBUTION TO THE
UNDERSTANDING AND DEVELOPMENT OF
CONSTITUTIONAL LAW

FOREWORD

EACH YEAR the contributors to the *Annual Survey of American Law* dedicate the volume to the citizen who in their judgment has made the most significant contribution during the year to the law. The list of dedicatees is indeed a notable one, ranging from laymen like former President Hoover in recognition of his work as chairman of the commission charged with recommendations for reorganizing the executive department of the national Government and Mr. Bernard M. Baruch for his pioneer efforts for the international control of atomic energy, to jurists like Judge Manley O. Hudson for his work on the Permanent Court of International Justice and Dean Roscoe Pound for everything he has done for the law at home and abroad, and especially for his years of effort in China to set up a system of jurisprudence adapted to the needs of that great people. The list includes distinguished lawyers like Carl McFarland for drafting the Federal Administrative Procedure Act, Phanor J. Eder for his great contributions to the field of comparative law, and Robert P. Patterson for his lifetime of public service as judge, as Secretary of War and as advocate of law reforms. The legislative branch of Government has been recognized in the work of Senator Robert M. LaFollette, Jr., Representative A. S. Mike Monroney and Dr. George B. Galloway on the Congressional Reorganization Act of 1946. The group is as remarkable collectively for the catholicity of their interests as they are individually for their high achievements in making great contributions to the law.

This year by common consent it has been agreed that the greatest individual contribution to the law in 1953 is represented in *The Constitution of the United States of America: Analysis and Interpretation*, edited by Edward S. Corwin, McCormick Professor of Jurisprudence Emeritus at Princeton University. The volume is the product of three years of concentrated effort, but it embodies the scholarship of a lifetime devoted to the study and teaching of constitutional law.

For laymen generally, as well as for most lawyers, American constitutional law has become a labyrinth in which it is almost impossible to avoid being lost. Now, thanks to Professor Corwin, the maze has been charted and the path made clear so that there is no longer any danger of losing one's way. All that one would like to know about American constitutional law and its background, as well as the decisions of the Supreme Court of the United States construing it, is

laid open to view in a single volume, albeit a large one, of attractive format.

Although the subtitle "Analysis and Interpretation" taken by itself might lead one to expect a colorless, academic discussion of the work of the Supreme Court, anyone who knows Professor Corwin personally or has read any of his works will quickly realize that on a subject as close to the realities of our national life as his is, *he* could not be colorless. In his writings over the years he has not merely made his meaning clear but he has spoken out vigorously, in trenchant language, on scores of controversial issues. Therefore one would not expect, even though the volume is an official publication, an anemic discussion of the decisions of the Court such as we find in the headnotes of reported decisions. In short, there are life and plenty of red corpuscles in his volume. On the other hand, it may be said with equal truth that his analyses of the decisions of the Court have been prepared entirely without bias or partisan slant. The resultant volume combines the maximum of information with a high degree of readability.

As a consequence of the catalytic effect of Professor Corwin's scholarship and personality we may now approach the study of our constitutional law without the feeling of hopelessness of ever being able to master it that has afflicted the subject for many years. It is not too much to expect that the publication of the volume will result in a renaissance of study of constitutional law in this country, and that the law schools may be encouraged by its availability to resume their responsibility, all too often neglected for a variety of reasons that we may not discuss here, of teaching public law with the same thoroughness and the same spirit of professional interest that they have traditionally taught many branches of private law. We venture the hope that the success of the present work will inspire Professor Corwin to crown his life-work by writing his own "Commentaries on the Constitution."

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PART ONE

Public Law: In General

INTERNATIONAL LAW

CECIL J. OLMSTEAD

FROM THE perspective of the United States of America, and probably from that of the entire "free world," the most significant and foreboding event of 1953 is the onrush of the proposals for a Constitutional Amendment limiting the international agreement-making power of the President and the Senate of the United States.¹ The proposed Amendment was introduced by Senator Bricker and, after lengthy hearings before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary, was reported² to the Senate by the Judiciary Committee.³

In a world which technology is steadily shrinking, but which nevertheless remains divided by contrary ideologies, the United States finds itself in a position of leadership of an ideological pole. To effectively carry out its mission and destiny within the "free world," the United States must enter into relationships of increasing interdependence with its allies. The proposed Amendment is merely the latest manifestation of an isolationism which would have this country turn its back upon its moral obligations and contemporary role in the world community.⁴

Basically, the enactment of the proposed Amendment would cause

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¹ For a survey of the status of these proposals one year ago see 1952 Annual Surv. Am. L. 19, 28 N.Y.U.L. Rev. 17 (1953).

² On June 15, 1953, by a vote of 9-5.

³ Revised text of substantive sections: "Section 1. A provision of a treaty which conflicts with this Constitution shall not be of any force or effect. Section 2. A treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of a treaty. Section 3. Congress shall have power to regulate all executive and other agreements with any foreign power or international organization. All such agreements shall be subject to the limitation imposed on treaties by this article. Section 4. The Congress shall have power to enforce this article by appropriate legislation. . . ." N.Y. Times, June 16, 1953, p. 13, col. 2.

⁴ While in the first instance, the proposed Amendment is properly classifiable as constitutional law, yet its effects which are treated here have far-reaching international law implications.

a radical redistribution of the foreign affairs power, now concentrated in the President and the Senate, both within the Federal Government and to the states. Section 2 of the proposal, along with Section 3, would bring under the regulation of the whole Congress all treaties and executive agreements which are intended to become effective as internal law in the United States.⁵ As if these provisions are not serious enough, the so-called "which" clause of Section 2⁶ would place the conclusion of treaties on certain matters beyond the scope of the Federal Government entirely,⁷ and would empower the states to effectuate foreign affairs respecting matters not specifically delegated to the national Government.

The conduct of foreign affairs and the practices of international law depend to a large degree upon mutuality.⁸ Should the foreign relations power of our Government be subjected to the delays and uncertainties which the proposed Amendment would introduce, an element of mutuality would be lost, for, after all, what party to contractual negotiations wishes to reveal his ultimate position to his opposite party on what might prove to be a hypothetical agreement.

There should be a compelling justification for enactment of a Constitutional Amendment which would reduce our sovereign national power in foreign affairs to shambles. Yet its proponents, after 165 years of operation, cannot conjure up a single abuse of the international agreement-making power as it is now established. In the absence of evidence that our treaty and executive agreement practices have mis-served us, it's not "time for a change." Agitation in favor of this Amendment has served but one useful purpose: the stimulation of an intense interest in current international relations manifested by the volume of writing on this subject.⁹

⁵ It has not been determined what tribunal will decide whether the agreement relates to internal or foreign law. If the determination is to be made by a court, it must await a "case or controversy." The same comment is applicable to the "conflicts with this Constitution" phrase of § 1.

⁶ "... which would be valid in the absence of a treaty."

⁷ The rationale behind this provision rests upon a fallacy: it is said that our Federal Government is one of delegated powers and that all powers undelegated are retained by the states and, that as the Federal Government cannot exceed these delegated powers by domestic law, it should not do so by international agreement. Of course, this division of powers between federal and state governments only applies to domestic affairs and was never intended to apply to foreign affairs which are within the plenary powers of the national Government. See U.S. Const. Art. I, §§ 8, 10; Art. II, §§ 2, 3; Art. III, § 2; Art. VI.

⁸ Statement by Dep't of State, Hearings before a Subcommittee of the Committee on the Judiciary on Sen. J. Res. 1 at 836.

⁹ An illustrative sample of the material follows: Hearings before a Subcommittee on the Judiciary of the U.S. Senate on Sen. J. Res. 1 (1953); Report of Section of International and Comparative Law of A.B.A. (1953); Bricker, *Making Treaties and Other International Agreements*, 289 *Annals* 134 (1953); Cohen, *Some Comments on the*

The effectuation of the European Defense Community¹⁰ with an integrated German military force remains a cornerstone of United States foreign policy. While none of the signatories of the treaty¹¹ constituting the European Defense Community has yet ratified it, the process of ratification has been instituted in Germany, and conclusion seems assured following the overwhelming victory of Dr. Adenauer in recent German elections.¹² As EDC is a genuine supranational body, it is approached with some skepticism and has an uncertain future.¹³ Several difficult obstacles stand between France and ratification. The French have insisted that a solution with Germany for the Saar problem must precede ratification and M. Bidault, the Foreign Minister, has recently proposed acceptance of a European Political Community prior to submission of EDC to the National Assembly. The current impasse over Trieste has not improved prospects of Italian ratification. Granted that these hurdles are formidable, the basic objection to the creation of a common army is that it should be an institution for carrying out a common foreign policy which today is nonexistent among the proposed members.

I

INTERNATIONAL AGREEMENTS

The international agreement-making process produced a vast volume of agreements, more than 200 in number, both multilateral and

Bricker Amendment, 48 N.U.L. Rev. 185 (1953); Dean, The Bricker Amendment and Authority over Foreign Affairs, 32 Foreign Affairs 1 (1953); Fenwick, Proposed Limitations upon Executive Agreements, 47 Am. J. Int'l L. 284 (1953); Pearson & Backus, Save the Peace Power: Don't Strait-Jacket Treaties, 39 A.B.A.J. 804 (1953); Preuss, On Amending the Treaty-Making Power: A Comparative Study of the Problem of Self-Executing Treaties, 51 Mich. L. Rev. 1117 (1953); Satterfield, Constitutional Amendment by Treaty and Executive Agreement, 24 Miss. L.J. 280 (1953); Should the Constitution be Amended to Limit the Treaty-Making Power?, 26 So. Calif. Rev. 347 (1953).

¹⁰ For earlier developments and historical background see 1952 Annual Surv. Am. L. 5, 28 N.Y.U.L. Rev. 3 (1953); Walton, Background for the European Defense Community, 63 Pol. Sci. Q. 42 (1953).

¹¹ The significant provisions of the treaty are: contribution to Western defense within the NATO framework by integrating members' armies (Arts. 1, 2); each contributing nation will be on equal footing (Art. 6); each country is permitted to maintain forces outside EDC in specified cases (Arts. 8-18). Four major organs are established: the Commissariat, the Assembly, the Council and the Court. The Council, the supreme political authority, consists of representatives of the six governments, (Arts. 39-50) set up to resolve decisions of the Commissariat (the executive body) with the several governments and provide policy guidance. The Court of the Coal and Steel Community serves as the Court of EDC (Arts. 51-67). Military provisions are found in Arts. 68-82.

¹² However, the constitutionality of EDC has not been determined by German courts. Should the constitutional decision go against EDC, Adenauer probably can muster two-thirds majorities in both houses of Parliament for a constitutional amendment authorizing limited German rearmament.

¹³ Fenwick, Treaty Establishing the European Defense Community, 46 Am. J. Int'l L. 698 (1952); Holcombe, An American View of European Union, 47 Am. Pol. Sci. Rev. 417 (1953).

bilateral, on a range of subject matter¹⁴ covering the popular demands and expectations of peoples throughout the world. These signs of a wide area of agreement and mutuality within the world community bode well for its future. During the year 1953, the United States ratified treaties of friendship, commerce and navigation with Israel, Ethiopia, Greece, Finland, Germany, and Japan. The United States also ratified the North Atlantic Treaty Organization agreement regarding the status of forces.¹⁵

International Organizations.—The most dramatic, and probably the most significant, agreement of the United Nations was the Armistice Agreement on Korea together with the Accords on the Disposition of Prisoners of War signed by the Commander-in-Chief, United Nations Command, and the Supreme Commander of the Korean People's Army and the Commander of the Chinese People's Volunteers on July 27, 1953.¹⁶ The Armistice Agreement delineates a military demarcation line centered in a demilitarized zone two and a half miles wide,¹⁷ limits introduction of military personnel and equipment to replacement,¹⁸ establishes a Military Armistice Commission of senior officers from each side empowered to effectuate the agreement and settle any violations¹⁹ and a Neutral Nations Supervisory Commission to supervise, inspect and investigate troop withdrawals and weapons replacement.²⁰ The more novel and controversial provisions of the agreement deal with the arrangements regarding prisoners of war.²¹ Those prisoners who insist on repatriation were to have been returned within sixty days after the effective date of the agreement.²² To insure all prisoners of war an opportunity to exercise their rights of repatriation, Sweden, Switzerland, Poland, Czechoslovakia, and India were each requested to appoint a member to a Neutral Nations Repatriation Commission²³ established to take custody of those prisoners who, while in custody of the detaining powers, did not exercise their right to repatriation. Inaugurating a procedure unique in international relations, the agreement provides²⁴ that these prisoners are to remain in the custody of the

¹⁴ From the Korean Armistice Agreement to an agreement between the United Kingdom and Greece regarding reciprocal abolition of visas.

¹⁵ See p. 6 *infra*.

¹⁶ For complete text see N.Y. Times, July 27, 1953, p. 6, col. 1.

¹⁷ Art. I, §§ 1-5. This zone includes most of the scenes of fighting of the past year. The North Koreans and Chinese hold about 850 square miles of territory south of the 38th parallel while the ROK gained about 2350 square miles north of the parallel.

¹⁸ Art. II, § 13(c), (d).

¹⁹ Art. II, §§ 19-35.

²⁰ Art. II, §§ 36-50.

²¹ Art. III, §§ 51-59.

²² Art. III, § 51(a).

²³ Terms of Reference for Neutral Nations Repatriation Commission signed June 8, 1953, and annexed to the Armistice Agreement pursuant to Art. III, § 51(b).

²⁴ Section 8 of the Annex.

Commission for ninety days while representatives of the sides upon which they fought explain to them their rights and inform them of matters relating to their return.²⁵ At the expiration of ninety days after the transfer of custody of prisoners to the Commission,²⁶ access of representatives to them shall cease and the question of their disposition shall be submitted to the political conference recommended to be convened. The military commanders of both sides recommended to the governments of the countries concerned that within three months after the effective date of the agreement, a political conference be convened to settle the withdrawal of "foreign forces from Korea, the peaceful settlement of the Korean question, etc."²⁷

With the effectuation of the Armistice Agreement, another chapter of the globe's first collective action in resistance to aggression has closed. The creation of a lasting peace based upon a political settlement would be a most successful concluding chapter to this story of United Nations collective action against aggression.

The past year also saw the United Nations bring Ethiopia, Nicaragua, Sweden, Costa Rica, Nepal, Yemen, Ecuador, and Japan²⁸ into its technical assistance program.²⁹

Labor Conventions.—Three significant conventions of the International Labor Organization came into force during the year: the first concerns minimum-wage-fixing machinery in agriculture;³⁰ the second determines the maximum length of contracts of employment of indigenous workers;³¹ and the last provides for equal remuneration for men and women workers for work of equal value.³²

²⁵ For an excellent treatment of the legal issues involved see Charmatz & Wit, *Repatriation of Prisoners of War and the 1949 Geneva Convention*, 62 *Yale L.J.* 391 (1953). See also Lundin, *Repatriation of Prisoners of War*, 39 *A.B.A.J.* 559 (1953); Gutteridge, *The Repatriation of Prisoners of War*, 2 *Int'l & Comp. L.Q.* 207 (1953).

²⁶ Section 11 of the Annex. Custody commenced on September 25, 1953. Hence, the explanations are scheduled to end December 23. As the beginning of explanations was postponed until the middle of October, a controversy may develop in regard to an extension of the period. The U.N. has rejected a Communist request for an extension, but Prime Minister Nehru has called for "ninety clear days" for interviews.

²⁷ Art. IV, § 60. Special U.S. Envoy Arthur Dean met with Communist representatives at Panmunjom to set the time and place for this conference. See *Time*, Nov. 2, 1953, p. 28. However, an impasse developed over participation of neutral nations in the conference and no progress has resulted. See *N.Y. Times*, Nov. 5, 1953, p. 1, col. 2.

²⁸ Registered with Secretariat of the United Nations under Nos. 2241, 2074, 2096, 2121, 493, 2142, 2194, and 499. U.N. Statement of Treaties and International Agreements, ST/LEG/SER. A/71 et seq. (1953).

²⁹ For a list of participating countries one year ago see 1952 *Annual Surv. Am. L.* 1, 28 *N.Y.U.L. Rev.* 2 (1953).

³⁰ Registered with Secretariat of the United Nations under No. 2244. U.N. Statement of Treaties and International Agreements, supra note 28. Ratified by New Zealand, Mexico, and the United Kingdom.

³¹ Registered with Secretariat of the United Nations under No. 2125. U.N. Statement of Treaties and International Agreements, supra note 28. Ratified by the United Kingdom and Guatemala.

³² Registered with Secretariat of the United Nations under No. 2181. U.N. Statement

Western Defense Arrangements.—After lengthy debate,³³ the Senate on July 15, 1953, adopted, seventy-two to fifteen, a resolution of ratification of the executive agreement³⁴ between the parties to the North Atlantic Treaty regarding the status of their forces, signed at London on June 19, 1951.³⁵ Controversy arose over the provisions of the agreement vesting jurisdiction in the receiving State over the sending State's forces and their dependents with respect to offenses committed within the territory of the receiving State and punishable by its law,³⁶ and the grant of exclusive jurisdiction to the receiving State over the forces of the sending State for offenses relating to the security of the receiving State and punishable by its law, but not by the law of the sending State.³⁷ A reservation introduced by Senator Bricker which would have granted reciprocal extraterritorial jurisdiction was defeated,³⁸ and the resolution of ratification was agreed to with an amendment whereby the United States may exclude or remove persons from its territory whose presence is deemed prejudicial to its safety or security. A similar agreement was reached with Japan.³⁹

The Senate also advised and consented to the ratification of an agreement on the status of the North Atlantic Treaty Organization, National Representatives, and International Staff.⁴⁰ This agreement was signed by the parties to the North Atlantic Treaty at Ottawa on September 20, 1951, and defines the rights, privileges, and immunities of NATO, its personnel, and the representatives of member states in the territory of each of the members.⁴¹ Also approved was a protocol on the status of the International Military Headquarters established pursuant to the North Atlantic Treaty.⁴²

Yugoslavia was brought within the Western penumbra of defense through its Treaty of Friendship and Collaboration with Greece and Turkey.⁴³ Another strange bed fellow drawn into this general plan

of Treaties and International Agreements, *supra* note 28. Ratified by Yugoslavia, Belgium, Mexico, and France.

³³ 99 Cong. Rec. 9024 (July 14, 1953); 99 Cong. Rec. 9086 (July 15, 1953).

³⁴ 82d Cong., 2d Sess., Sen. Exec. T (1953).

³⁵ For text see 99 Cong. Rec. 9024 (July 14, 1953); for text of Senate resolution see 99 id. at 9080.

³⁶ Art. VII, 1(b).

³⁷ Art. VII, 2(b), (c).

³⁸ 99 Cong. Rec. 9083 (July 14, 1953).

³⁹ N.Y. Times, Oct. 24, 1953, p. 3, col. 2.

⁴⁰ 99 Cong. Rec. 9089-91 (July 15, 1953).

⁴¹ The agreement will come into force when six signatory nations have deposited their instruments of ratification with the United States. Up to October 2, 1953, ratifications were deposited by the United States, Denmark, Iceland, the Netherlands, and Norway. See Dep't State Press Release 538, Oct. 2, 1953.

⁴² 99 Cong. Rec. 9091 (July 15, 1953).

⁴³ Registered with Secretariat of the United Nations under No. 2199. U.N. Statement of Treaties and International Agreements, *supra* note 28.

was Spain, which concluded three agreements with the United States providing for the construction and use of military facilities in Spain by the United States, economic assistance, and military end-item assistance.⁴⁴

International Wheat Agreement.—A new agreement⁴⁵ revising and renewing for a three-year period the International Wheat Agreement of 1949 entered into force on August 1.⁴⁶ As in the prior agreement, the obligation of an exporting country⁴⁷ is to deliver a specified quantity of wheat at the maximum price in the agreement, and that of an importing country⁴⁸ is to purchase a specified quantity of wheat at the minimum price. The new agreement involves a larger quantity of wheat for the United States and authorizes a much better price.⁴⁹

II

INTERNATIONAL COURT OF JUSTICE

Obligation to Arbitrate.—The principal litigation before the court during the year was the *Ambatielos Case*⁵⁰ in which it was determined that the United Kingdom is under an obligation to submit to arbitration its difference with the Greek Government concerning the claim⁵¹ of Ambatielos presented by Greece. The court was not faced with a determination of its own jurisdiction but with determining the jurisdiction of the arbitration tribunal.⁵² For an obligation to arbitrate to result, the claim must be one based on the provisions of a Treaty of Commerce between the countries signed in 1886. As the court was not deciding on the validity of the claim, a decision had to be framed which, while determining that the claim was based on the treaty, did not decide that it was supportable under the treaty. Hence, the court held⁵³ that the

⁴⁴ 29 Dep't State Bull. 435-42 (1953).

⁴⁵ Text appears in 99 Cong. Rec. 8891-900 (July 13, 1953).

⁴⁶ 29 Dep't State Bull. 245 (1953).

⁴⁷ Exporting countries are the United States, Australia, Canada and France.

⁴⁸ There are forty-one importing countries.

⁴⁹ As applied to the current crop year, prices in the 1949 agreement are: maximum \$1.80 per bushel, minimum \$1.20. For the duration of the new agreement prices are: maximum \$2.05, minimum \$1.55.

⁵⁰ *Ambatielos Case* (Greece v. United Kingdom), 1953 I.C.J. Rep. 10 (merits: obligation to arbitrate). Previously, the court decided it lacked jurisdiction to judge the merits of the claim but did have jurisdiction to decide whether the United Kingdom was obliged to submit the claim to arbitration. *Ambatielos*, Judgment, 1952 I.C.J. Rep. 28 (jurisdiction).

⁵¹ Arising from a contract made in 1919 between a Greek shipowner and the Government of the United Kingdom for the sale of steamships.

⁵² Cf. *Mavromattis Palestine Concessions*, 1 Hudson, World Court Rep. 293 (1924) (jurisdiction), in which the court determined its own jurisdiction over a dispute arising under the Palestine Mandate.

⁵³ McNair, Basdevant, Klaestad, and Read dissenting, on grounds that: (1) the court must consider whether the claim is within the terms of the treaty of 1886, and (2)

Hellenic Government was relying upon an arguable construction of the treaty, whether or not it ultimately prevails, and that, therefore, there were reasonable grounds for concluding that the claim was based on the treaty.⁵⁴

Jurisdiction.—Within the time limit allowed Guatemala to file its counter-memorial in the *Nottebohm Case*,⁵⁵ its government notified the court that as its declaration of acceptance of compulsory jurisdiction had expired since proceedings were instituted, it did not consider that the court had jurisdiction of a case affecting Guatemala. The court ordered the Government of Liechtenstein to present a statement of its observations on the jurisdictional question. It seems well settled that jurisdiction of the parties once perfected continues until the tribunal determines the case.

Other Decisions.—The interesting but relatively unimportant case between France and England involving ownership of the English Channel islets of Minquiers and Ecrehos was decided after being before the court for three years.⁵⁶ As was pointed out in the press, this decision marks the first international case won by Great Britain in almost five years. While both parties based their claims upon events deep in antiquity,⁵⁷ the court preferred to base its decision upon Great Britain's occupation of the islets, in so far as their circumstances permit, coupled with her exercise of state functions over them.

*The Case of the Monetary Gold Removed from Rome in 1943*⁵⁸ between Italy, on the one hand, and France, the United Kingdom, and the United States, on the other, was postponed for further pleading.

III

THE INTERNATIONAL LAW COMMISSION

Fifth Session.—The International Law Commission of the United Nations met in its fifth session at Geneva, Switzerland, from June 1 to August 14, 1953.⁵⁹ This session saw the fruitful culmination of much of the research, study, and discussion which has marked former meetings of the Commission. Referred to the General Assembly for recom-

such a consideration indicates the claim is not within the provisions of the treaty. *Ambatielos Case*, 1953 I.C.J. Rep. 10, 31, 35.

⁵⁴ *Ambatielos Case*, 1953 I.C.J. Rep. 10, 18, 22.

⁵⁵ *Nottebohm Case*, Order, 1953 I.C.J. Rep. 7. The case concerns a claim by Liechtenstein of a denial of justice to its national in Guatemala.

⁵⁶ N.Y. Times, Nov. 18, 1953, p. 1, col. 1.

⁵⁷ *Ibid.*

⁵⁸ 1953 I.C.J. Rep. 37.

⁵⁹ For detailed documentation of proceedings see Report of the International Law Commission covering the work of its fifth session, U.N. General Assembly, Official Records: 8th Sess., Supp. No. 9 A/2456 (June 1-Aug. 14, 1953).

mentation "to Members with a view to the conclusion of a convention"⁶⁰ was the final draft on arbitral procedure.⁶¹

Draft on Arbitral Procedure.—As a result of governmental comment on the former draft and study of it by Commission Members, several substantial changes were made. Among the more important revisions⁶² is one⁶³ which provides a procedure for constituting the arbitral tribunal when the parties themselves fail to make the appointments. The earlier draft required recourse to third States for assistance in constituting the tribunal and if such recourse were unsuccessful, the appointments could be made by the President of the International Court of Justice upon request of either party. The current draft eliminates recourse to third States thereby both simplifying the procedure and expediting the final decision. To assure continuity of proceedings, references to unilateral withdrawal of an arbitrator by a party have been deleted.⁶⁴ While the necessity for a *compromis*, describing the dispute and detailing procedural and administrative rules of the tribunal, is recognized, the failure of the parties to reach a *compromis* will not frustrate the prior agreement to arbitrate for the tribunal itself may ultimately prepare the *compromis*.⁶⁵ The jurisdiction of the arbitral tribunal over counterclaims is limited to those arising directly out of the subject matter of the original dispute.⁶⁶ In order to insure a conclusion of proceedings when instituted, the tribunal may, with consent of either party, extend the time limits, as fixed by the parties, for rendition of an award.⁶⁷ Revision of an award is limited to cases of discovery of new material facts, and the application for revision must be made within six months of discovery and, in any case, within ten years of the award.⁶⁸

The procedures and institutions provided by the draft are well designed to reach a decision in those disputes submitted to arbitration by the parties. Unfortunately, however, nation-states usually limit such disputes to controversies too unimportant to constitute a cause of war.

⁶⁰ Statute International Law Commission Art. 23(1)(c), U.N. Doc. A/CN.4/4 (Feb. 2, 1953).

⁶¹ Discussion of earlier draft may be found in 1952 Annual Surv. Am. L. 7-9, 28 N.Y.U.L. Rev. 5-7 (1953).

⁶² For complete text and commentary see Report of the Commission, *supra* note 59, c. II.

⁶³ Art. 3.

⁶⁴ Art. 7. However, in cases of illicit or fortuitous withdrawal of an arbitrator, permanency of the tribunal is assured for the vacancy will be filled as in cases where the parties were unable to agree to an appointment.

⁶⁵ Arts. 9, 10. Since Art. 3 makes provision for constitution of the tribunal in absence of agreement, there will be a tribunal in existence to prepare the *compromis*.

⁶⁶ Art. 16.

⁶⁷ Art. 23. The previous draft required consent of both parties to an extension of time limits.

⁶⁸ Art. 29.

Régime of the High Seas.—The codification of the international law of the régime of the high seas is in various stages of preparation. The Commission recommended to the General Assembly for adoption by resolution the draft articles on the continental shelf.⁶⁹ The "continental shelf" is "the sea-bed and subsoil of the submarine areas contiguous to the coast, but outside the area of the territorial sea, to a depth of two hundred metres."⁷⁰ The coastal state is accorded sovereign rights within these areas for exploration and exploitation of natural resources, but its rights do not extend to the superjacent waters or the airspace above.⁷¹

The Commission recommended that the General Assembly, by resolution, adopt the Commission's draft articles on fisheries⁷² and enter into consultation with the United Nations Food and Agricultural Organization for the preparation of a convention which will include the principles adopted by the Commission. An article⁷³ on the contiguous zone was adopted but no recommendation was made to the General Assembly as the Commission has not adopted articles on the territorial sea.

Nationality Including Statelessness.—Acting upon a resolution⁷⁴ of the United Nations Economic and Social Council requesting the Commission to expedite preparation of a draft international convention for elimination of statelessness, the Commission considered a report⁷⁵ of Roberto Córdova,⁷⁶ special rapporteur on the topic of nationality including statelessness. The report contained two draft conventions: the first on the Elimination of Future Statelessness and the second on the Reduction of Future Statelessness. Both provisional drafts⁷⁷ were adopted and referred to the Secretary-General for issuance as a Commission document. Governments are being invited to

⁶⁹ Complete text appears in Report of the Commission, *supra* note 59, c. III.

⁷⁰ Art. 1. While the two-hundred-metre depth affords certainty in fixing the shelf, technological innovation may render it obsolete shortly. See Proclamation by President Truman of Sept. 28, 1945, in regard to the asserted jurisdiction of the United States over continental shelf resources. 10 Fed. Reg. 12303 (Oct. 2, 1945). But cf. Proclamations of Latin-American States which have claimed rights of government over the superadjacent high seas as well as over the continental shelf. Argentine Decree No. 14,708 (Oct. 9, 1946), translated in 41 Am. J. Int'l L. Supp. 11 (1947).

⁷¹ Arts. 2-4.

⁷² Report of the Commission, *supra* note 59 at 17.

⁷³ *Id.* at 19. The coastal State would be authorized to exercise control over the high seas adjacent to its territorial sea to prevent and punish violations of such State's laws. This control may not exceed twelve miles from the base line determinant of the territorial sea.

⁷⁴ Res. No. 319 B III of the Economic and Social Council, 11th Sess., adopted Aug. 11, 1950.

⁷⁵ U.N. Doc. A/CN.4/64 (March 30, 1953).

⁷⁶ At the Fourth Session Córdova replaced Manley O. Hudson, who retired as special rapporteur for reasons of health.

⁷⁷ See Report of the Commission, *supra* note 59, for full text and commentary.

consider and submit comments on the drafts which would eliminate statelessness at birth;⁷⁸ confer upon a foundling, whose birthplace is unknown, the nationality of the State where it is found;⁷⁹ prevent loss of nationality by change of status except in cases where another nationality is acquired;⁸⁰ prohibit deprivation of nationality as a penalty if statelessness would result;⁸¹ and establish appropriate judicial and administrative tribunals within the framework of the United Nations to represent stateless persons and to interpret and apply such a convention.⁸² So long as important global decision-makers refuse to recognize individual human beings as subjects of international law, the doctrine of statelessness may be utilized to deprive certain individuals of equal access to, and protection of, fundamental notions of due process of law. Hence, a national tie for each person is a matter of great concern and urgency.

IV

NATIONAL COURT DECISIONS

War: Korean Action Not a War.—Two recent decisions, *Beley v. Pennsylvania Mutual Life Insurance Co.*⁸³ and *Harding v. Pennsylvania Mutual Life Insurance Co.*,⁸⁴ concern the question as to whether the Korean hostilities constituted a war as the term is used in a war exclusion clause of a life insurance policy.⁸⁵ The insured in the *Beley* case was killed serving with United States forces under United Nations Command in Korea, whereas *Harding* was killed in a railway accident in the United States en route to a training center. Following a series of cases which arose out of the Japanese attack at Pearl Harbor,⁸⁶ the court held in both cases by four-to-two decisions, that the conflict in Korea could not be categorized a war "within what may be termed the constitutional or legal sense," and permitted recoveries on the policies for the face amounts. As a touchstone for decision, the court invokes the exclusive constitutional power of Congress to declare war, and

⁷⁸ Art. 1. If otherwise stateless, the child would acquire at birth the nationality of State where born.

⁷⁹ Art. 2.

⁸⁰ Art. 5.

⁸¹ Art. 7.

⁸² Art. 10.

⁸³ 373 Pa. 231, 95 A.2d 202, cert. denied, 74 Sup. Ct. 34 (1953), 28 N.Y.U.L. Rev. 899; lower court decision noted in 21 Geo. Wash. L. Rev. 657 (1953); 26 Temp. L.Q. 336 (1953).

⁸⁴ 373 Pa. 270, 95 A.2d 221, cert. denied, 74 Sup. Ct. 21 (1953).

⁸⁵ The provision limited liability to return of premiums "in the event . . . insured engages in military or naval service in time of war. . . ."

⁸⁶ *Savage v. Sun Life Assurance Co.*, 57 F. Supp. 620 (W.D. La. 1944); *West v. Palmetto State Life Ins. Co.*, 202 S.C. 422, 25 S.E.2d 475 (1943); *Rosenan v. Idaho Mut. Benefit Ass'n*, 65 Idaho 408, 145 P.2d 227 (1944); *Pang v. Sun Life Assurance Co.*, 37 Hawaiian Rep. 208 (1945).

concludes that in absense of such a declaration, war in the legal sense does not exist. The real question for determination is whether the parties to the contract intended to exclude recovery only in case of war in the constitutional sense or whether the term "war" connotes a state of fact irrespective of congressional action. As ascertainment of the intention is probably impossible, the court might reasonably assume the parties contracted with knowledge of the rule that courts will not take notice of the existence of a war until it is declared by Congress. However, the purpose of the war exclusion clause is to protect the insurer against the great increase in risk coincident with war service, and not contemplated in the fixed premium. Hence, the legalistic determination ignores the well-known purpose of insurers.

Precedents stating when war exists, deduced from past conditions, are probably inadequate for rational decision of the question during a period of "cold war." Furthermore, if the Charter of the United Nations is strictly applied, war of the declared or constitutional type may be for historians.⁸⁷

As past decisions are not in harmony⁸⁸ and many cases concerning the status of the Korean hostilities are being litigated, it is unfortunate that the Supreme Court refused to grant review.

Immunity to Suit.—Several important cases deal with the amenability of governmental agencies to suit. Emphasizing the conclusion that the Anglo-Iranian Oil Company, Ltd., is an instrumentality of the British Government which owns 35 per cent of the capital but dominates voting rights, a district court ordered a subpoena quashed with respect to Anglo-Iranian⁸⁹ in the special grand jury investigation of several oil companies for possible violations of the Sherman Antitrust Law. The determination is not to be made from consideration of quantum of stock ownership by the government, but rather from the nature of the function of the instrumentality. Because Anglo-Iranian was organized to insure a proper supply of fuel to the British Navy, the court held it was indistinguishable from the British Government. While the function of the agency is an important criterion in ascertaining whether its nature is governmental, yet to make it controlling is questionable. It is probably true that certain private United States oil companies are supplying the armed forces with fuel as a major part of

⁸⁷ "Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockades, and other operations by air, sea, or land forces of members of the United Nations." U.N. Charter, Art. 42.

⁸⁸ *New York Life Ins. Co. v. Bennion*, 158 F.2d 260 (10th Cir. 1946) denied recovery through application of a "realistic" determination of the existence of war.

⁸⁹ *In re Investigation of World Arrangements with Relation to the Production, Transportation, Refining and Distribution of Petroleum*, 13 F.R.D. 280 (D.D.C. 1952).

their activity; however, from that function alone, it would not be concluded that they are government instrumentalities.

*Frazier v. Hanover Bank*⁹⁰ involved an action against defendant bank to compel delivery of certain bearer certificates of the Republic of Peru to plaintiff rather than to all bondholders as the Government of Peru had ordered. Defendant's motion to dismiss was granted upon the theory that, as the paying agent of Peru, it was entitled to partake of Peru's sovereign immunity. Defendant, of course, has no personal immunity, but the claim was in fact one against property in which Peru claimed an interest.

A New York supreme court decided⁹¹ that a member of the Italian Observer Delegation to the United Nations was not entitled to immunity from civil suit as the Headquarters Agreement does not refer to the observer category and has not been interpreted to confer immunity upon such personnel.

Recognition of Foreign Acts of State.—Several interesting decisions concerned the extraterritorial effect to be accorded the acts of state of a foreign government.⁹² *Anglo-Iranian Oil Co. v. Société Union Petrolifera Orientale*⁹³ involved an action by Anglo-Iranian for a declaration of its ownership in a cargo of oil purchased by defendant from the Iranian Government and transported to Italy. The oil was from properties of Anglo-Iranian which are subject to a nationalization law of Iran. In dismissing the plaintiff's action, the court stated that in cases where the transaction is completed abroad, and the only problem before the court is the legal consequence of the act, lawfully performed in the foreign country, the fact that the transaction may be contrary to Italian public policy is irrelevant.⁹⁴

A novel case⁹⁵ grew out of the establishment of the Netherlands Government-in-Exile-in-England which was recognized by the United States as the *de jure* Dutch Government. During World War II that government issued a decree purporting to seize all securities of Dutch domiciliaries to conserve their rights during the German occupation. Four bonds which were confiscated by the German authorities in Hol-

⁹⁰ 119 N.Y.S.2d 319 (Sup. Ct.), *aff'd*, 119 N.Y.S.2d 918 (App. Div., 1st Dep't 1953).

⁹¹ *Pappas v. Francisci*, 119 N.Y.S.2d 69 (Sup. Ct. 1953).

⁹² For an excellent analysis of the problem see McDougal, *The Comparative Study of Law for Policy Purposes: Value Clarification as an Instrument of Democratic World Order*, 61 Yale L.J. 915, 931 (1952).

⁹³ 67 II Gazzettino (Venezia) No. 61, p. 4 (Italy, Civil Tribunal of Venice 1953). While this Survey is of American law, the article on International Law includes some foreign judicial decisions on international law for "international law is a part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction. . . ." Gray, J., in *The Paquete Habana*, 175 U.S. 677, 700 (1900).

⁹⁴ 47 Am. J. Int'l L. 509 (1953).

⁹⁵ *State of the Netherlands v. Federal Reserve Bank*, 201 F.2d 455 (2d Cir. 1953), 53 Col. L. Rev. 561.

land eventually came into the possession of the defendant in the United States. Relying upon the decree, plaintiff brought an action for the bonds, and defendant, acting as a stockholder, interpleaded an American claimant. Relying heavily upon an earlier New York decision,⁹⁶ the court reversed a district court decision which had held the rule of the *Anderson* case inapplicable because the bonds here involved were located in the Netherlands when the decree was promulgated. Stating that the *locus* of bonds does not determine their *situs* for all purposes, the court gave extraterritorial effect to the Netherlands decree as regards property in the effective control of another sovereign. Prior to this decision, American courts had generally refused to effectuate decrees of foreign governments purporting to affect interests in property located outside of the territorial jurisdiction of the government,⁹⁷ except in cases where an international compact recognized such an effect.⁹⁸ Finding that "modern authority" in international law⁹⁹ does not prohibit recognition of extraterritorial effects of expropriatory decrees, the court reasoned that as seizures by the occupying power were beyond its legitimate rule,¹⁰⁰ decrees intended to prevent such seizures must be within the power of the absentee sovereign.

This result is much more preferable than one which would be reached by following the antiquated doctrine that military conquest completely ousted the sovereignty of the former government. The grant of extraterritorial effect to the decree served to protect the legitimate property rights of individuals from the effects of aggressive warfare.

The Court of Appeals of New York in *Perutz v. Bohemian Discount Bank in Liquidation*¹⁰¹ decided that because of United States membership in the International Monetary Fund,¹⁰² New York courts could not, on the ground of public policy, refuse to recognize foreign exchange control regulations of Czechoslovakia, another Fund member. This decision marks the first judicial recognition that the Fund agreement has effected a change in prior domestic law regarding foreign

⁹⁶ *Anderson v. N.V. Transandine Handelsmaatschappij*, 289 N.Y. 9, 43 N.E.2d 502 (1942) (upholding same decree with respect to property located in New York for which compensation had been made).

⁹⁷ *The Maret*, 145 F.2d 431 (3d Cir. 1944) (decree of unrecognized Soviet Socialist Republic of Estonia); *Vladikavkazsky Ry. v. New York Trust Co.*, 263 N.Y. 369, 379, 189 N.E. 456, 460 (1934) (stating that the result would be the same irrespective of recognition).

⁹⁸ *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937).

⁹⁹ *State of the Netherlands v. Federal Reserve Bank*, 201 F.2d 455, 461 (2d Cir. 1953).

¹⁰⁰ Art. 46, Fourth Hague Convention (1907), 36 Stat. 2307 (1910).

¹⁰¹ 304 N.Y. 533, 110 N.E.2d 6 (1953), 2 Am. J. Comp. L. 389.

¹⁰² For text of Articles of Agreement of the International Monetary Fund, see *United States Treaties and Other International Acts Series 1501*; 59 Stat. 512 (1945), 22 U.S.C. § 286 (1946).

exchange controls.¹⁰³ Previously courts had usually ignored them on grounds of public policy or by deft manipulation of private international law doctrines of proper law of the contract.

Sovereignty: Standing to Sue.—Affirming¹⁰⁴ a decision that the Republic of China could maintain an action although a dispute existed as to the presidency, the Court of Appeals for the District of Columbia said:

The Republic of China itself, not its president, is the plaintiff. Its status to sue . . . is unaffected by controversy over the presidency.¹⁰⁵

Recognition: Retroactivity of Effect.—Two decisions of wide significance on the difficult question of the effect of recognition upon matters of succession were rendered by the highest courts of the British Commonwealth. During World War II Great Britain recognized, as the *de jure* Government of Poland, the Polish Provisional Government established in London. From July 6, 1945, His Majesty's Government granted *de jure* recognition to the Government of National Unity established in Poland which had been the *de facto* government in Metropolitan Poland from June 28, and ceased to recognize the London Government on the former date. Under a Polish law, the London Government, as supreme controller of the defendant Polish company, made a contract on July 3, 1945, in London with plaintiffs, members of the Polish Merchant Marine, whereby they would receive certain bonuses. Resisting payment of the bonuses, defendant company contended that the retroactive effect of recognition of the new government renders the contract of the old government invalid, as after recognition on July 6, 1945, the new government must then be recognized as the *de jure* government from June 28, the date it assumed *de facto* control. The House of Lords affirmed a judgment in favor of the plaintiffs¹⁰⁶ holding that the *de facto* control of the new government did not extend to the old government or to the Polish merchant fleet and personnel until July 6, 1945.¹⁰⁷ The effect of the retroactivity doctrine is thus limited to areas or spheres under *de facto* control of the new government. Defendant's argument that its Polish domicile placed it under control of the new government was rejected on the theory that plaintiffs relied "on powers conferred on the Polish Government by Polish legislation and the

¹⁰³ Meyer, Recognition of Exchange Controls after the International Monetary Fund Agreement, 62 Yale L.J. 867, 869 (1953).

¹⁰⁴ Pang-Tsu Mow v. Republic of China, 201 F.2d 195 (D.C. Cir. 1952), cert. denied, 345 U.S. 925 (1953).

¹⁰⁵ Id. at 199. For earlier history of the case see 1952 Annual Surv. Am. L. 11-12, 28 N.Y.U.L. Rev. 9-10 (1953).

¹⁰⁶ Gdynia Ameryka Line v. Boguslawski, [1953] A.C. 11.

¹⁰⁷ Rejecting the rule of Guaranty Trust Co. v. United States, 304 U.S. 126 (1953), to the effect that the retroactive effect of recognition is unlimited except in regard to completed transactions of nationals of the recognizing country.

government entitled to operate such powers in London on July 3, was the government which was then recognized as the Government of Poland by the British Government."¹⁰⁸ The decision does not dispute the doctrine that a corporation is under effective control of the government of the country of its corporate domicile, for the act was not one of the company, but an act of the London Government in exercise of Polish law. Suffice it to say that had the case been one involving contrary acts of the two governments, the factor of corporate domicile might have forced a different decision.

The other case is the *cause célèbre*, *Civil Air Transport Inc. v. Central Air Transport Corp.*,¹⁰⁹ concerning the dispute between the Chinese Nationalists and Communists over ownership of a large number of aircraft. On December 12, 1949, while the British Government recognized the Nationalist Government of China as the *de jure* government, the Nationalists sold forty aircraft situated at Hong Kong to a partnership formed by two United States citizens. Subsequently, the partnership transferred the aircraft to the plaintiff, a Delaware corporation, which brought a proceeding for a declaration that the aircraft were its property. Prior to the sale, the aircraft were the property of the defendant Central Air Transport Corporation, an unincorporated agency of the Government of China. On November 12, 1949, the Communist Government of China issued an order assuming control of defendant whereupon certain of defendant's employees in Hong Kong defected to the Communist Government and took physical possession of the planes. Defendant's manager, loyal to the Nationalists, secured an interim injunction from a Hong Kong court restraining the defecting employees from interfering with the aircraft. However, the injunction was disregarded and the ex-employees remained in control. From January 6, 1950, the British Government recognized *de jure* the Communist Government of China which since the preceding October had been the *de facto* government of the parts of China under its effective control. The Hong Kong court's dismissal of plaintiff's action was reversed by the Judicial Committee of the Privy Council. Reasoning that the primary purpose of the doctrine of retroactivity is to validate acts of a *de facto* government which has later become the new *de jure* government and not to invalidate acts of a prior *de jure* government, the Privy Council, therefore, held that the *de jure* recognition of the Communist regime did not operate retroactively to invalidate the transaction of the Nationalists transferring property in the aircraft. The court sidestepped the fact that at the time of the transfer of the aircraft by the Nationalists they were in the effective control of the Com-

¹⁰⁸ *Gdynia Ameryka Line v. Boguslawski*, [1953] A.C. 11, 46 (Lord Reid).

¹⁰⁹ [1953] A.C. 70 (P.C.).

munists,¹¹⁰ through the defecting employees, by characterizing this possession as unlawful and without effect because in defiance of the injunction.

The result of the cases produces a doctrine that recognition *de jure* relates back to the time the government obtained effective control, but is limited to application in the areas of effective control, or outside of those areas in relation to events effectively controlled according to the local law. A British court could hardly have been expected to decide the aircraft case otherwise, for a contrary decision would have placed strategic equipment in the hands of an enemy then engaging British military forces in Korea.

Nationality.—In a proceeding for a declaration of United States citizenship, a United States district court held the Nationality Act of 1940¹¹¹ tolled where a dual national was prevented by wartime conditions from returning from Italy within the two-year period permitted dual nationals residing abroad to return to the United States and take up permanent residence.¹¹²

The volume of expatriation cases varies directly with the increase and ease of international travel. *Acheson v. Maenza*¹¹³ is representative of a type of case which resulted from World War II. Plaintiff, a dual national, went to Italy seeking employment during the depression years. Caught in the Italian drive for empire, he was drafted into the armed forces under universal military training, and upon discharge, was informed by American consulate authorities that he was not entitled to a passport for return to the United States as he had expatriated himself. Subsequently, he voluntarily served in the Italian army during World War II. The Government of the United States contended that plaintiff was expatriated either by taking an oath of allegiance upon entry into the Italian army or by service therein. Declaring plaintiff to be an American citizen, the court of appeals stated expatriation can result only from the voluntary act of a citizen. In deciding whether or not military service is voluntary, the criterion for determination is not whether the person voluntarily entered the service or whether it was pursuant to a draft law. On the other hand, the court must consider all of the circumstances surrounding the entry into service. Relying upon plaintiff's evidence that he objected to conscription, and taking notice of the well-known demands of the Fascist regime for military manpower, the court concluded that active opposition to military service would have been futile and dangerous, and that therefore, an infer-

¹¹⁰ On this point, see *Gdynia Ameryka Line v. Boguslawski*, [1953] A.C. 11. Oddly enough the Judicial Committee does not refer to the *Gdynia* case.

¹¹¹ 54 Stat. 1168 (1940), 8 U.S.C. § 801 (1946).

¹¹² *Peduzzi v. Brownell*, 113 F. Supp. 419 (D.D.C. 1953).

¹¹³ 202 F.2d 453 (D.C. Cir. 1953).

ence of voluntary expatriation was not to be drawn from mere voluntary service in foreign armed forces. Should the "cold war" suddenly become "hot," cases of this nature would become legion as a result of the current American *avant garde* abroad.

Immunity of United Nations Employee.—The interesting case of *United States v. Keeney*¹¹⁴ grew out of the refusal of defendant, a former employee of the United Nations Secretariat, while testifying before a special subcommittee of the United States Senate, to answer the question: "Did anyone in the State Department aid you in obtaining employment with the United Nations?" Mrs. Keeney based her refusal upon the ground that she was forbidden to do so by the rules and regulations of the United Nations. This resulted in her indictment for contempt of Congress. In denying defendant's motion for acquittal, the court held that under the law of the United States and general international law, there was no privilege applicable to the information sought by the question. Furthermore, the staff rules¹¹⁵ of the United Nations were found irrelevant to the requested information which concerns events that occurred prior to her employment and would have been learned from sources outside the United Nations. This case emphasizes the inherent conflict in interests of the United Nations in exercising exclusive authority over its employees and maintaining its international independence and the interests of the United States in protecting its national security. An accommodation acceptable to the proponents of both interests has not been devised.

V

SURVEY OF LITERATURE

While none of the books which have appeared since the preceding survey seems destined to become a classic of international law, several works of sound scholarship should be mentioned. Of great academic interest is the eagerly awaited release of the permanent edition of Professor William S. Bishop's *International Law*.¹¹⁶ This casebook retains the leading cases on international doctrine from an earlier age, but is also rich with newer cases and definitive editorial notes. It should prove to be a useful addition to the teacher's materials.

Hans Kelsen's textbook for law students was received with mixed comments depending upon the legal philosophy of the commentators.¹¹⁷

¹¹⁴ 111 F. Supp. 233 (D.D.C. 1953).

¹¹⁵ "Staff members shall exercise the utmost discretion in regard to all matters of official business. They shall not communicate to any other person any unpublished information known to them by reason of their official position, except in the course of their duties or by authorization of the Secretary-General. This obligation does not cease with separation from service." U.N.O. Staff Rule No. 7.

¹¹⁶ Bishop, *International Law: Cases and Materials* (1953).

¹¹⁷ Kelsen, *Principles of International Law* (1952). Book Reviews: Kimball, 33

The philosophy of Professor Kelsen, and the theory presented in the book, is positivist and monistic. An attempt is made to present doctrine and theory alone in order to propound a general theory of international law. This results, of course, in a mere restatement of the so-called "rules" of international law.

Professor Northrop's latest book, *The Taming of the Nations*,¹¹⁸ raising basic questions about the applicability of the Point 4 and technical assistance programs of aid to underdeveloped countries, was most timely and has been exceedingly well received. On a closely related topic is Arnold Toynbee's reprint¹¹⁹ of his Reith Lectures of 1952 on *The World and the West*. These lectures treat the broad impact, including technological and industrial techniques, of western civilization upon the "rest of the world," and in turn, suggest the outlines of an impending impact of the "rest of the world" upon the "West." The controversy over the basic approach of United States foreign policy, which was stimulated by the recent national elections, was continued in a book¹²⁰ by James Burnham.

A most informative and useful monograph, *Laws and Practices Concerning the Conclusion of Treaties*,¹²¹ was issued in the United Nations Legislative Series. This publication is largely the result of replies to inquiries from the Secretary-General to the governments of the world requesting an analysis of the constitutional provisions governing the negotiation of treaties by the respective governments. It contains information from eighty-six nation-states on the subject of treaty negotiation, as well as an excellent bibliography of treatises, monographs and articles. During the current year, the Secretariat of the United Nations inaugurated a loose-leaf service, entitled *Status of Multilateral Conventions of which the Secretary-General Acts as Depositary*,¹²² which gives the history and current status of all conventions concluded under the auspices of the United Nations. The conventions are grouped into chapters, each with a table of contents prepared according to subject matter. Because of its loose-leaf nature, the service will be kept current very economically.

While the most popular subject matter of periodical literature was

B.U.L. Rev. 431 (1953); Schuman, 20 U. of Chi. L. Rev. 356 (1953); Baxter, 41 Geo. L.J., 128 (1952).

¹¹⁸ Northrop, *The Taming of the Nations* (1952).

¹¹⁹ Toynbee, *The World and the West* (1953).

¹²⁰ Burnham, *Containment or Liberation? An Inquiry into the Aims of United States Foreign Policy* (1953). A more basic question is raised by Cheever and Haviland who wonder whether the separation of powers doctrine inherent in our constitutional system will permit stable foreign policies. Cheever & Haviland, *American Foreign Policy and the Separation of Powers* (1952).

¹²¹ U.N. Doc. St/Leg/Ser. B/3 (1953).

¹²² U.N. Doc. St/Leg/3 (1953).

the proposal to restrict the treaty-making power of the national Government,¹²³ the volume of legal writing on international law topics continues to increase.¹²⁴ Among the more notable articles of which mention should be made is the concluding part of Professor Edwin Dickinson's study, "The Law of Nations as Part of the National Law of the United States, II."¹²⁵ Mr. Richard Rank contributed two articles which together constitute a study on whether or not a treaty remains in force during a period of war.¹²⁶ Several interesting articles dealt with the diverse economic aspects of international law and foreign relations.¹²⁷ Professor Quincy Wright published a timely and novel article, "The Outlawry of War and the Law of War."¹²⁸

¹²³ See note 9 *supra*.

¹²⁴ This selection is illustrative, but by no means exhaustive: Alexandrowicz-Alexander, *The Quasi-Judicial Function in Recognition of States and Governments*, 46 *Am. J. Int'l L.* 631 (1952); Snyder, *Measure of Compensation for Nationalization of Private Property*, 3 *Catholic U. L. Rev.* 107 (1953); Taubenfeld, *International Actions and Neutrality*, 47 *Am. J. Int'l L.* 377 (1953).

¹²⁵ 101 *U. of Pa. L. Rev.* 792 (1953). The initial part of this study appeared in 101 *U. of Pa. L. Rev.* 26 (1952).

¹²⁶ Rank, *Modern War and the Validity of Treaties*, 38 *Cornell L.Q.* 321, 511 (1953).

¹²⁷ Among them were: Boyd, *Treaties Governing the Succession to Real Property by Aliens*, 51 *Mich. L. Rev.* 1001 (1953); Cardozo, *Foreign Aid Legislation: Time for a New Look*, 38 *Cornell L.Q.* 161 (1953); Kronstein, *The Nationality of International Enterprises*, 52 *Col. L. Rev.* 983 (1952); Littell, *Improvements in Legal Climate for Investments Abroad*, 38 *Va. L. Rev.* 729 (1952).

¹²⁸ 47 *Am. J. Int'l L.* 365 (1953).

THE UNITED STATES AND THE UNITED NATIONS

CLYDE EAGLETON

THE UNITED NATIONS never lacks for matters of interest; it has a new crop of problems each year. This is of course to be anticipated in a body whose function is to do trouble-shooting for the world. It is to be doubted, however, whether anyone foresaw that the UN would be persecuted by its leading Member and host country, once known as the great proponent of democratic freedom of opinion and speech. It is difficult to recognize this country—the United States of America—under the mask of fear, hatred, demagoguery and unreason which it now wears; other peoples look upon it with anxiety and puzzlement. We shall consider below the more serious manifestations of this attitude, but we may note here briefly two examples of the ignorance and unreason upon which current hate campaigns are being waged. It is said that UNESCO is a Communist-dominated body which will introduce communism into our public schools; the fact is that the Soviet Union and its satellites hate it and refuse to be members. In any case UNESCO has neither authority nor ability to control American education. It is also said that the United States pays all the bills of the UN; the fact is that the UN spends in this country over twice what we pay—which amounts to about seven cents per person for UN expenses, and about sixteen cents per person including all the Specialized Agencies.¹ It is definitely not good advertising for democracy when the people of the leading democracy can do no better thinking than this.

Other difficulties have faced the UN during the past year. The Korean imbroglio proves as difficult to end as it has been to carry on, and it is only part of the larger need for settlement, such as in Austria, Germany or Indo-China. It would appear that the Members of the UN are becoming weary of their quiescent role in the struggle between the Soviet Union and the United States and are beginning to act more independently. The anticolonial movement has become a swelling tide of revolt against white domination,² and the plea of self-determination has been exaggerated beyond all reason. This is part of the broader struggle for human rights, a worthy effort, but carried to such extravagant statement that the United States has announced that it would not accept the proposed Covenant(s) of Human Rights. It is to be hoped

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¹ See the interesting article, U.N. Proves a Paying Guest; Spends Twice its Cost to the United States, N.Y. Times, March 16, 1953, p. 1, col. 2.

² See p. 28 *infra*. See also 1952 Annual Surv. Am. L. 21, 29-32, 28 N.Y.U.L. Rev. 19, 27-30 (1953).

that this announcement will reassure the proponents of American Bar Association and Bricker proposals to amend the Constitution in a way which would greatly weaken the United States in the exercise of its treaty-making power—proposals which originated in groundless fears that the UN might compel us to do something we might not want to do. In the economic field, vast and constructive enterprises are being contemplated, through technical assistance and in other ways; there is now a controversy between those who want a Special United Nations Fund for Economic Development and those who would have to finance it. Only in the field of law is the UN placid, for no one bothers with law or courts when political methods are preferred.

I

POLITICAL AND SECURITY

The activities of the Security Council now require but little space; it is stymied in most fields, and has met infrequently during the past year. Its "primary responsibility" for peace and security is increasingly being taken over, during its impotence, by the General Assembly. At the election of the nonpermanent Members, the United States again prevailed and Turkey was elected, over the protest of the Soviet Union that this was a violation of a "Gentlemen's Agreement" of 1946, under which its Eastern European candidate would be chosen. The United States appears to have been somewhat intransigent in this respect, and it required eight ballots before Turkey was elected.

Korea.—The chief and continuing topic in this field has of course been the Korean situation. The Seventh Assembly, cheered by the negotiations at Panmunjom, adopted Resolution 610(VII) calling for repatriation of the prisoners of war in accordance with the 1949 Geneva Convention and at the same time asserting that force should not be used to prevent or to effect return of prisoners to their homelands.³ There was room for argument that the latter position was contrary to the 1949 Convention, and it became and continues to be a controversial issue, long delaying settlement. The resolution also proposed a Repatriation Commission of four "neutral" states to supervise the execution of the armistice terms. It was not accepted, however, and negotiations dragged on until June 8, 1953, when an armistice agreement was signed by the respective military commanders.⁴ This defined a demilitarized zone and provided for a Military Armistice Commission and a Neutral Nations Supervisory Commission composed of Sweden, Switzerland, Poland and Czechoslovakia. The Agreement recommended to the Gov-

³ Mayda, *The Korean Repatriation Problem and International Law*, 47 *Am. J. Int'l Law* 414 (1953); 13 *U.N. Bull.* 421, 431, 487 (1952).

⁴ The text of the agreement may be found in 15 *U.N. Bull.* 115 et seq. (1953).

ernments concerned that a political conference be called within three months to "settle through negotiation the questions of the withdrawal of all foreign forces from Korea, the peaceful settlement of the Korean question, etc." An additional agreement concerning repatriation of prisoners of war arranged for India to supply armed forces and operating personnel, and to serve as Chairman of the Neutral Nations Commission.

Matters were complicated by the uncompromising President of South Korea, Syngman Rhee, who refused to sign the armistice agreement, released thousands of Korean prisoners, and threatened to fight the whole world if things were not done as he wanted. A special envoy was sent to Korea to straighten out this embarrassing situation, and it was claimed that a satisfactory arrangement was made. Rhee remains an uncertain factor.

The Seventh Assembly, meeting again in August, agreed that the United Nations should be represented at the political conference by the sixteen nations which had forces fighting in Korea; the Soviet Union could sit with "the other side" if "the other side" desired it. A Soviet proposal for a round table, rather than bilateral, conference was rejected, though this procedure would seem to be more in keeping with the character of the UN. Underneath this debate lies a constitutional, though largely theoretical, question: has the United Nations been engaged in a war in Korea, or in a police action? Is it a party, or a judge, or both?

Many delegates wished India to be represented at the political conference, but South Korea (Rhee) bitterly dislikes India and the United States was therefore forced to oppose the inclusion of India. Indian representatives and troops have handled the repatriation of prisoners in an efficient and humane fashion, but the unwillingness of the Korean prisoners to listen to Communist persuasions has led to a deadlock. As this is written, the fate of the political conference is uncertain.

Kashmir.—The next most important political dispute was the long-standing one between India and Pakistan. This conflict involves control over the state of Kashmir, within which both maintain armed forces, and over river waters arising in India and flowing into Pakistan where they are vital for irrigation purposes. It seems fairly certain that, but for UN pressure, much blood would have been shed in this area. On October 10, 1952, Mr. Frank Graham, UN Representative for India and Pakistan, made a thorough report to the Security Council.⁵ The two states had long ago agreed that the fate of Kashmir would

⁵ Mr. Graham's findings are reported as Fourth Report of U.N. Representative for India and Pakistan, U.N. Doc. S/2783 (Sept. 19, 1952). The resolution which authorized

be determined by a plebiscite conducted under the auspices of the United Nations, but this had been delayed by their inability to agree upon a procedure for demilitarization. Mr. Graham was able to show progress, ten of his twelve propositions having been accepted by both states; and, encouraged by this, Sir Gladwyn Jebb offered a resolution jointly with the United States asking the two states to agree upon the extent of reduction of their armed forces on both sides of the cease-fire line.⁶ A conference between the two states in Geneva in February led to no agreement, and optimism has faded away again.

Palestine.—The struggle between Israel and her neighbors is again becoming intense. The decision to move the Israeli Foreign Office to Jerusalem found no favor anywhere and was condemned by the Arab states as a violation of internationalization. Egypt and Israel have detained ships destined for the other; there have been protests against Israeli plans to divert water from the Jordan River; and various border incidents have added to the fire until the situation again appears serious. The Chief of Staff of the UN Truce Supervision Organization has twice been called back, and the Security Council was finally summoned to hear the complaint.⁷

Other Troubles.—It has now become routine for the General Assembly to pass resolutions denouncing the Union of South Africa for its treatment of nonwhites,⁸ and for that country to reply that this is a domestic question and that the resolutions passed by the Assembly are unconstitutional. Burma complained that the presence of Chinese Nationalist forces was a violation of her territory and sovereignty,⁹ and the Assembly adopted a resolution asking Members to assist in evacuating these forces and to give no assistance to them in Burma.¹⁰ Means were later found for transporting them, or some of them, back to the Nationalist China area. A special committee on admission of new members reported failure in its effort to find a solution to that impasse. The Western powers refuse to admit all applicants en bloc (though they were the first to propose it), maintaining nobly that states should be admitted on merit only; the Soviet Union steadily vetoes. The Disarmament Committee was asked to continue its vain efforts.¹¹ The

his work is U.N. Doc. S/1100 (Nov. 9, 1948). See also Second Interim Report, U.N. Comm'n for India and Pakistan, U.N. Doc. S/1196 (Jan. 10, 1949).

⁶ U.N. Doc. S/2839 (Nov. 5, 1952) (adopted at 611th meeting of the Security Council).

⁷ Verbatim Record, U.N. Doc. S/PV 630, 631 (Oct. 27, 1953), U.N. Doc. S/PV 632 (Oct. 29, 1953), U.N. Doc. S/PV 633 (Oct. 30, 1953).

⁸ G.A. Resolutions 615(VII) and 616(VII) (Dec. 5, 1952).

⁹ Complaint of Burma, U.N. Docs. A/2375 (March 26, 1953), A/2423 (July 22, 1953), A/2468 (Sept. 11, 1953).

¹⁰ G.A. Resolution 707(VII) (April 23, 1953).

¹¹ G.A. Resolution 704(VII) (April 8, 1953). See report, U.N. Disarmament Comm'n, Official Records, Spec. Supp. 1 (1952).

Collective Measures Committee, set up under the Uniting for Peace Resolution of 1950, made its Second Report, which was approved by the General Assembly on November 6, 1952.¹² This considered economic measures, such as embargo, and means of distributing the burden of action against an aggressor equitably among those participating. It agreed that a UN independent armed force was impracticable but suggested that Members might contribute toward a UN Volunteer Reserve Corps. During the debates, some concern was expressed as to the weakening of the universal system through the building of regional military systems such as NATO.

II

ECONOMIC AND SOCIAL

The work of the Economic and Social Council is not, for the most part, of sensational news value, but in the course of its multifarious activities there are many useful developments, hardly noticed by the press. By way of illustration there may be mentioned the Road and Transport Commission, which has drawn up a Convention on Road Traffic which will provide for the automobile driver international licensing, uniform road signs and symbols, and other uniformities to enable him to drive safely in strange countries. Similarly, the tourist will find that there are a certain number of uniform sanitary regulations in the various states. The trade in narcotics is carefully reported; there are also statistical compilations of many kinds, such as those pertaining to world population, price and production, and economic conditions throughout the world.¹³ The Fiscal Committee is working on the problems of double taxation and on measures of taxation through which private investment might be encouraged in other countries. Human rights, the status of women, freedom of the press, conservation of resources, and many other matters fall within the Council's jurisdiction—a jurisdiction which can only recommend its measures to the General Assembly. The thought has been expressed that it is a rather useless intermediary between its various commissions and the General Assembly, and that the commissions might report directly to the Assembly. It is in this field that new international law is constantly being developed, though it remains true that the extent to which this law will be adopted depends upon the ratifications which states are willing to give to the conventions embodying it.

Technical Assistance.—By far the most important work being done in this field is the assistance now being given to underdeveloped

¹² G.A. Resolution 703(VII) (March 17, 1953).

¹³ U.N. Catalogue of Economic and Social Projects, No. 4 (1953) (Sales No. 1953.II D. 2).

countries.¹⁴ This is a remarkable development which is not only our most powerful weapon against Soviet expansionism, but also a profitable investment in the sense that as prosperity develops in large areas of the world there will be much greater need for the skills and production of the United States. The underlying principle is to help the underdeveloped countries to help themselves; and the insufficient amount of money allowed the UN for this purpose is made to go a long way through the provision of expert advisers, through fellowships and technical education. These countries, however, need capital money also, and the International Bank, which lends money conservatively, does not satisfy the need. Consequently, there has been strong pressure to set up a Special United Nations Fund for Economic Development which can supply money at greater risk. The countries which have the needed money have not been enthusiastic about putting money into this Fund; they would go no further than to say that they might help if money could be released through disarmament.¹⁵ Fascinating vistas of human progress are opened up by noting gains thus far made: rice-growers in Japan, Thailand and Indonesia exchange experience as to methods of raising fish in the rice fields; Saudi Arabia now has assembly lines for packaging dates; foundry output in Pakistan has increased by 40 per cent; malaria is being stamped out by DDT and the disease called yaws by penicillin.

Human Rights.—Many of those who read this will have more interest in human rights than in the other activities that fall under the Economic and Social Council. In this field, as in others related to it, the delegates have taken the bit into their teeth and are running wild.¹⁶ Not content with the Declaration of Human Rights, which was not legally binding but which set a standard of achievement by which States could develop in their own ways, they have sought to put these standards into a Covenant(s), a treaty legally binding upon them. Indeed, they have added exotic and unknown economic and social rights to the understood political and civic rights stated in the Declaration; they have even included among the rights of individuals the right of self-determination. There was so much material, and so much controversy, that an attempt was made to split it into two Covenants.

¹⁴ Not exclusively by the Economic and Social Council. The United Nations now has a Technical Assistance Administration and a Technical Assistance Board, and a great deal of work is done through the specialized agencies.

¹⁵ The joke is made that it may be SUNFED but it will not be fed in any other way. Nevertheless, such a Fund is needed and will doubtless be achieved sooner or later.

¹⁶ The British delegate, while supporting the South African argument that the UN had intervened illegally in South African affairs, quoted Mr. Lodge, the representative of the United States: "The United States has observed with increasing concern the tendency of the General Assembly to place on its agenda subjects the international character of which is doubtful." U.N. Doc. A/PV 435 (Sept. 17, 1953).

This extravagance led Mrs. Lord, United States Representative to the Human Rights Commission, acting under instructions from President Eisenhower, to announce that the United States would not accept the Covenant, though willing to continue the study of human rights. This decision was doubtless somewhat motivated by internal political considerations. The frightened American Bar Association, and some senators, had stirred up popular support for an amendment to the Constitution which, in order to prevent the acceptance of a treaty which would not be accepted in any case, would hamstringing the treaty-making powers of the United States in all cases.¹⁷ One can feel sure that most of the countries whose orators speak most emotionally for the Covenant of Human Rights would not ratify it if it were ever presented to them.

III

TRUSTEESHIP AND DEPENDENT AREAS

It will be recalled that the trusteeship system, continuing the idea of a "sacred trust of civilization" embodied in the mandates system of the League of Nations, arranged to receive under the supervision of the United Nations these mandated territories, or territories taken from the enemy during the war, or other areas which might be voluntarily put under the UN by those responsible for them. In fact, all the mandated areas were put under the trusteeship system except Southwest Africa, and the UN has steadily brought pressure to bear upon the Union of South Africa to induce her to turn Southwest Africa into a trust territory. Efforts have thus far been in vain, though South Africa acknowledges some obligations. By Article 76 of the Charter, the Administering Authorities are expected to prepare these territories for independence, and the Trusteeship Council watches over them. While there is occasional vociferation, on the whole the work of this Council has proceeded without too great controversy. It has been debated whether an Administering Authority should be allowed to combine a trust area with a colonial area for administrative purposes. Some of the trust territories are moving steadily toward independence, such as the Gold Coast; some are combining into larger units, such as the attempt at a Central African Federation. All are affected by current desires for their independence expressed by states already independent.

A different, and much more dangerous and difficult situation appears with regard to the Non-Self-Governing Territories, more usually known as colonies. When Chapter 11 was adopted into the Charter of

¹⁷ A bibliography on this subject may be found in 8 *The Record, Ass'n of Bar of City of N.Y.* 376 (1953). For a summary of the situation concerning human rights, see Simsarian, *Progress in Drafting Two Covenants on Human Rights in the United Nations*, 46 *Am. J. Int'l Law* 710 (1952).

the United Nations, it was regarded as an exceptional step forward that colonial powers would accept some principles to guide them in colonial administration and that they were willing to make reports concerning this administration. If it had been realized how far these rather innocuous Charter provisions would be stretched, it is to be doubted whether they would have been placed in the Charter. Whereas the trust territories were to be prepared for independence, the Non-Self-Governing Territories were to be helped toward self-government; and the colonial powers agreed to make reports to the Secretary-General concerning achievement in this direction, carefully omitting from the obligation anything concerning political conditions. The General Assembly, over their objections, first set up a Committee to examine these reports, and this of course afforded opportunity for criticism and suggestion. When The Netherlands and the United States respectively reported that Surinam and Puerto Rico had now become self-governing and that therefore reports need no longer be made concerning them, the question was raised whether they, or the United Nations, had the right to make this decision. A Committee on Factors was created, and governments were asked their opinions. Only four gave answers to the questions asked, among them the United States, which took the position that the Assembly could state the factors which should be taken into consideration in determining whether self-government had been reached, and could recommend these criteria to Members; it did not, however, think they could be more than guides for States to consider. The United States and others maintained that such recommendations should apply not only to colonies but "to peoples who enjoyed independence prior to World War II but who have since had a dependent status imposed upon them."¹⁸

Steady and increasing pressure for independence of colonies has been applied in the United Nations upon the colonial powers; whether a people is ready for independence has not been a matter for consideration. Against this pressure the colonial powers have vainly called upon Article 2, paragraph 7, of the Charter, which forbids intervention by the United Nations into domestic affairs, and have argued that what was done was unconstitutional; in this they were doubtless correct, but they were overridden, and there is no Supreme Court in the United Nations to which they can appeal. The first illustration of the strength of the movement, though it did not arise under Chapter 11, was the separation of Indonesia from The Netherlands. Libya became independent, and Italian Somaliland and Eritrea were put upon the path.

¹⁸ U.N. Doc. A/AC.67/2 (May 8, 1953). The final report of the Committee is found in U.N. Doc. A/2428 (Aug. 4, 1953). For a general discussion of the above see Eagleton, *Excesses of Self-Determination*, 31 *For. Affairs* 592 (1953).

Flushed with these achievements, the Arab-Asian-African group sought to rescue Tunis and Morocco from France, which resisted strongly, denying any rights of the UN in the situation. The United States was at first on the fence, which is not surprising since the traditions of the American people have been against colonialism, and they had not yet become cognizant of a changed situation. At the Seventh General Assembly, in December 1952, the effort was pushed again, though France had warned that she would not participate in such illegal discussions. Nevertheless thirteen States introduced a resolution calling on France to take steps toward self-government for Tunis; it was rejected by a twenty-seven (including the United States) to twenty-four vote, with seven abstentions. A milder Latin-American resolution was adopted, expressing confidence that France would further the development of free institutions in Tunis. A similar situation developed as to Morocco. The same thirteen States called on France to negotiate a settlement with the sovereign State of Morocco; it was rejected and a milder Latin-American resolution adopted. In August, fifteen Arab-Asian States called for an "urgent meeting" of the Security Council to consider the Moroccan question, but after debate lasting through six meetings, the Council refused, five to five, with one abstention, to take up the matter. The United States, United Kingdom, and France opposed consideration on the grounds that no threat to the peace was involved, and that consideration of the question would be intervention in the domestic affairs of France, contrary to the Charter.¹⁹

The arguments above mentioned are doubtless technically correct, but delegates vote in the UN on political grounds, with little attention to Charter restrictions. The colonial powers appear now to have stemmed somewhat the tide against them, but big questions remain. A tremendous revolution is in progress against "white domination," and on both sides much discretion will be needed. Furthermore, the arena is now the United Nations, which has as yet neither the authority nor the criteria to pass judgment on the constant pleas for "self-determination." It may exert pressures, but if it assumes such leadership, does it also accept responsibility for the new states created, responsibility for economic maintenance and for security against aggression? Would independence be good for some of those who claim it? And should the activities of the UN be directed only against colonial powers, or also against any States within which self-government is restricted? In this controversy, the United States has a narrow path on which to balance itself, between common sense and sympathy for colonial aspirations.

¹⁹ U.N. Doc. S/PV 624 (Sept. 3, 1953). See also G.A. Resolutions 611 (VII) (Dec. 17, 1952), 612(VII) (Dec. 19, 1952).

IV

LEGAL

Activity in the legal field has not been great.²⁰ The organs of the United Nations prefer to handle their affairs on a political basis rather than by reference to the Charter or the court. No advisory opinions were requested from the court during the past year. The *Nottebohm* case, between Liechtenstein and Guatemala, filed on December 17, 1951, has been held up by the objection of Guatemala that her acceptance of compulsory jurisdiction expired on January 26, 1952. A dispute between France and England, dating back to 1066, concerning the tiny islets of Minquiers and Ecrehos, was heard by the Court on September 16, 1953, and it was reported on November 17 that a decision favorable to England had been rendered.²¹

The efforts of the United Kingdom to improve the handling of legal questions by the various organs eventuated in Resolution 684 (VII), which recommended that requests for opinions from the International Court of Justice or the International Law Commission be referred to the Sixth Committee for drafting; and that amendments to the Rules of Procedure, or any other matter having important legal aspects also be referred to the Sixth Committee.²²

Resolution 687 (VII) had asked governments to comment on the Report of the Committee on International Criminal Jurisdiction, and created another Committee "to explore the implications and consequences of establishing an international criminal court and of the various methods by which this might be done" and "to study the relationship between such a court and the United Nations and its organs." This Committee met in August 1953, with George Morris of the United States as Chairman. A revised draft statute was drawn up, which would establish a permanent international court to try persons accused of crimes generally recognized as such under international law. It would have only such jurisdiction as might be conferred upon it by States, by conventions, by special agreement or by unilateral declaration; but no person could be tried by it unless jurisdiction had been conferred both by the State of which he was a national and the State where the crime was alleged to have been committed. The debates revealed that some regarded the proposed court as an infringement

²⁰ Questions concerning international law are dealt with in International Law, p. 1 *supra*. A summary statement concerning legal activities of the UN is to be found in United States Participation in the United Nations, Report by the President to Congress for the Year 1952, U.S. State Dep't Publication No. 5034 (1952).

²¹ N.Y. Times, November 18, 1953, p. 1, col. 1.

²² This matter is discussed by Yuen-II Liang, Notes on Legal Questions Concerning the United Nations, 47 Am. J. Int'l Law 439 (1953). See also 13 U.N. Bull. 300 (1952).

upon national sovereignty; some thought it was premature; and some were strongly for it. In the end, they agreed that the only way to handle the proposal was to have it drafted in treaty form by a diplomatic conference.²³

The long struggle to secure a definition of aggression is continued. By Resolution 688 (VII) a Committee was established to submit "draft definitions of aggression or draft statements of the notion of aggression"—terms of reference which indicate how confused the discussion had been. The Committee met in August 1953, and studied forms of aggression, the connection between each definition of aggression and the maintenance of international peace, the relationship to international criminal jurisdiction, and the effect of definitions upon the jurisdiction of United Nations organs. The Committee is to report to the Ninth Assembly.

A Yugoslav proposal would have the International Law Commission study as a matter of urgent priority the codification of the law of diplomatic intercourse and immunities. The urgency was due to disregard for the usual rights of diplomats shown to Yugoslavia by the Soviet Union; the United States complained of similar disregard. By Resolution 685 (VII) the Assembly requested that the International Law Commission undertake this codification "as soon as it considers it possible" and to "treat it as a priority topic." It was opposed by the Soviet Union, not unreasonably, on the ground that it was useless since the general subject was already on the agenda of the International Law Commission, which had been left free to take it up when they wished to do so. It was, of course, another example of misuse of the UN for propaganda purposes. The Commission postponed consideration of the topic until its next session in 1954.

As this is written, the Sixth Committee at the Eighth Assembly has urged that states speed up their ratifications of the Genocide Convention (though why this urgency exists is not clear), has proposed continuation of the United Nations Tribunal in Libya, and has recommended measures for shortening the length of the General Assembly sessions.

V

SECRETARIAT AND ADMINISTRATIVE LAW

The annals of the Secretariat are ordinarily routine and peaceful, but during the past year it has been in the headlines—a distinction which is usually to be achieved only through participation in a fight. Before taking this up, it should be noted that a new Secretary-General,

²³ For the draft report of the Committee see U.N. Doc. A/AC.65/L13 (Aug. 24, 1953). For the earlier part of this story see U.N.G.A.O.R. VII, Supp. 11, Report of the Commission on International Criminal Jurisdiction.

Dag Hammarskjöld of Sweden, was elected; and that Mr. Tchernyshev, a Russian, followed two previous Russians in the post of Assistant Secretary General in charge of the Security Affairs Department. The retirement of Ivan Kerno as Assistant Secretary General in charge of the Legal Department, and the suicide of Abe Feller, General Counsel, has left the Legal Department in some confusion; its future waits upon such plans of reorganization as the new Secretary-General may have. He, incidentally, will have a budget for the coming year of some \$48 millions—which would build only a moderate sized warship; the share of the United States in this budget is now down to one-third.

Loyalty Tests.—Patriotic Americans on a federal grand jury, in December 1952, asserted that they had startling evidence "of infiltration into the United Nations of an overwhelmingly large group of disloyal American citizens" and that this constituted a "menace to our Government." They denounced the Department of State for permitting this state of affairs.²⁴ When Secretary-General Lie asked for evidence, he was refused. Congressional committees fell into the hue and cry, and Mr. Lie asked a panel of jurists for advice.²⁵ The opinion issued by this panel has not received much praise. It was denounced strongly by Senator Rolin in the Belgian Senate at its sitting on January 20, 1953; four Canadian professors of law said that it was "a surprisingly unsatisfactory treatment of the complex problems presented to it."²⁶ They felt that the recommendations of the jurists involve "a large degree of surrender of independent standards of judgment by the United Nations whenever they differ from those of the host country"; the gravest aspect of the opinion, in their view, was that "the exercise of the legal privilege against self-incrimination in national proceedings is automatically a bar to employment in the United Nations."

Under Article 100 of the Charter each Member of the United Nations is obligated "to respect the exclusively international character of the responsibilities of the Secretary-General and the staff"; and it is much to be doubted whether the United States is living up to this obligation. A host State certainly has the right to protect its security and to demand loyalty from its own citizens, but if there is to be a penalty for disloyalty it should not consist in dismissal from the United Nations. For that matter, the opportunity for an American citizen to do harm to his own country would probably be greater outside than inside the United Nations. The methods by which accused persons are hounded without due process of law in our present hysteria are

²⁴ The Federal Grand Jury Presentment was printed in N.Y. Times, Dec. 3, 1952, p. 19, col. 1.

²⁵ Report of Sec'y-Gen. on Personnel Policy, U.N. Doc. A/2364, (Jan. 30, 1953); U.N.G.A.O.R. VII, Annexes, Agenda Item 75, reprinted in 47 Am. J. Int'l Law 87 (1953).

²⁶ 30 Can. B. Rev. 1080 (1952).

bad enough for our reputation without attempting to impose them upon the United Nations. The slight, if any, gain for our national security is not to be compared with the damage done to the international character and independence of the United Nations, or to the reputation of the United States for loyalty to that body or for her own administration of justice.

Secretary-General Lie announced that he would follow the recommendations of the Committee of Jurists, and accordingly dismissed a number of employees. On appeal, the Administrative Tribunal, highest court of the UN, held that they were unjustifiably dismissed.²⁷ The new Secretary-General faced the choice of reinstating them or indemnifying them, and for sound administrative reasons chose the latter course. This was *lèse-majesté* to any congressional investigating committee, one of which proposed at once to investigate why the Administrative Tribunal decided as it did! There are demands that the United States refuse to contribute money to an organization which would behave in such a fashion. A warm debate is to be expected in the General Assembly now in session when this item of finance appears on the agenda.

Visas.—In another respect, the current hysteria in the United States is injuring our reputation with foreign countries and the United Nations. Under such legislation as the McCarran Act, our officers abroad are hesitant to issue visas for entrance into this country to anyone even suspected of having some Communist sympathies or connections. Yet Communist states are Members of the United Nations and communists have a right to enter the United States for the purpose of doing business with the United Nations; this is stated in the Headquarters Agreement, by which the United States is bound. On several occasions, representatives of Non-Governmental Organizations, or other persons, some of whom were admitted communists, were refused admission. Mrs. Luckock of Canada sought to attend the Commission on the Status of Women, on behalf of the Women's International Democratic Federation, and Mr. Dessau sought to come from France as representative of the World Federation of Trade Unions. Both bodies are accredited to the Economic and Social Council, and in that body protests were made against the attitude of the United States in refusing admission to these people.²⁸ Doubtless the worst case was that of Mrs. Myrdal, formerly Director of the Department of Social Affairs and now connected with UNESCO. She came with a visa, on official busi-

²⁷ These cases are Judgments Nos. 18-42 of the Administrative Tribunal, U.N. Doc. AT/DEC/18-42 (Aug.-Oct. 1953). The indemnification ranged from a few hundreds to \$40,000 in one case.

²⁸ See 14 U.N. Bull. 313 (1953); 15 *id.* at 57, 133 (1955).

ness with the United Nations, but was nevertheless detained, and finally released "on parole"—a quite inexplicable procedure. If she had been a spy, she could have done as much damage "on parole" as if she had been regularly admitted. Even if a visa has been given and money spent on the trip, all can be upset by a minor immigration official who is afraid that a congressional committee might question him if he admitted the wrong person. It is a disgraceful situation, whatever the legal rights may be.

In April 1953, Ambassador Wadsworth told the Economic and Social Council that the United States had found it impossible to grant such applications for visas, and that it had a right to protect its national security under Section 6 of the resolution of the 80th Congress authorizing the United States to enter into the Headquarters Agreement. This section asserted that the Headquarters Agreement was not to be construed as diminishing the right of the United States to control the entry of aliens "into any territory of the United States other than the Headquarters District and its immediate vicinity," which would not seem to justify complete refusal to allow a person to come to the United Nations. Upon the suggestion of Mr. Sterner of Sweden, the Legal Department was asked for an opinion, and it held that there was not sufficient justification for the position taken by the United States, that there was no reservation made by the United States in accepting the Headquarters Agreement, and that a dispute existed which, under Article 21 of that Agreement, should be submitted to arbitration.²⁹ Several delegates upheld this view, but agreed not to press it for the time being, leaving adjustment of the matter to negotiations between the Secretary-General and the United States.

VI

LITERATURE

Before his untimely death, Mr. Feller published a compact little volume which showed his rare understanding of the actualities and potentialities of the United Nations.³⁰ There is a volume on the office of the Secretary-General, based largely on personal interviews.³¹ The Registrar of the International Court of Justice has published a carefully edited digest of the opinions of that Court.³² Volume XXXV, No. 2, of the Academy of Political Science contains short speeches of various persons as to "The United Nations: Success or Failure?" There is a recent volume by Mrs. Roosevelt and Mr. William Dewitt entitled *The United Nations: Today and Tomorrow*. While it does not meas-

²⁹ U.N. Doc. E/2397 (Aug. 5, 1953).

³⁰ Feller, *United Nations and World Community* (1952).

³¹ Schwebel, *The Secretary General of the United Nations* (1952).

³² Hambro, *The Case Law of the International Court* (1952).

ure up to its title, the book contains much interesting detail as to the housekeeping of the United Nations in addition to an interesting chapter on the valuable work being done through technical assistance. The United Nations itself has added some new series of interest to international lawyers: "Status of Multilateral Conventions of which the Secretary-General acts as Depository" (ST/LEG/3), "Statement of Treaties and International Agreements Registered or Filed and Recorded With the Secretary-General" (ST/LEG/SER.A/) and "Laws and Practices concerning the Conclusion of Treaties" (ST/LEG/SER.-B/3). It is also to be noted that the fifth volume of *International Arbitral Awards* has appeared (Sales No.1952.V.3). *The Yearbook of the United Nations* continues to be the most useful and complete yearly account; a shorter story, with critical discussion is given in the *1952 Annual Review of United Nations Affairs*.

CONFLICT OF LAWS

WILLIAM TUCKER DEAN

THERE were a number of significant decisions by the Supreme Court of the United States on conflict of laws, ranging from jurisdiction to determine the custody of children to the power of a state court to enjoin an action brought under a federal statute in another state court. Among the decisions of state courts probably the most interesting one was by the New York Court of Appeals on the law governing a contract to make a will. Of the numerous other cases from lower courts in the field of conflict of laws space will permit the discussion of only a few.

The most important development in the field of legislation was the adoption by the first state of the Uniform Commercial Code with its unusual provisions for choice of law in commercial matters. There were some further adoptions of various uniform acts.

The overwhelmingly significant contribution to the literature of this field was the publication of the first two volumes of Professor William W. Crosskey's massive *Politics and the Constitution in the History of the United States*. Of especial interest to students of conflict of laws are Chapters XXV and XXVI, which establish the constitutional basis for the supremacy of the federal judicial system. Professor Yntema in the first of his Cooley Lectures at the University of Michigan discussed the historical bases of conflict of laws.¹ Professors Blume and Joiner, also of the University of Michigan, published a useful casebook on judgments and jurisdiction,² which will be of interest to all students of conflict of laws, and Professor Graveson's second edition of his treatise on English doctrines of conflict of laws appeared.³

I

JURISDICTION

*Jurisdiction over Acts Abroad.*⁴—The extent of the legislative jurisdiction of Congress over the acts of United States citizens com-

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¹ Yntema, *The Historical Bases of Private International Law*, 2 Am. J. Comp. L. 297 (1953).

² Blume & Joiner, *Cases and Statutes on Jurisdiction and Judgments* (1952).

³ Graveson, *The Conflict of Laws* (2d ed. 1952); Mackay, Book Review, 10 U. of Toronto L.J. 142 (1953).

⁴ As has been customary, the topics of jurisdiction to tax and jurisdiction over extrastate corporations will be covered in the article on Corporations and the several articles on taxation.

mitted abroad has not been precisely defined, probably because it is seldom that Congress undertakes to exercise such jurisdiction. The narrower issue of whether the Lanham Trade-Mark Act of 1946⁵ was intended by Congress to apply to acts of citizens of this country done in a foreign country reached the Supreme Court recently, and the majority decided the Act applied to trade-mark infringements accomplished entirely in Mexico.⁶ Even the two dissenting justices did not question the power of Congress to forbid trade-mark infringements abroad where United States citizens are responsible, but simply disagreed with the majority as to whether Congress had done so in the Act in question. Both the majority and dissenting opinions took pains to distinguish the *American Banana Company* case,⁷ which certainly has been taken to indicate limitations on the power of Congress to govern acts of United States citizens abroad.

Although it has been stated that the dissimilarity of local and foreign law may make a cause of action in this country to recover for a wrong inflicted in another country unenforceable,⁸ jurisdiction to entertain such a transitory cause of action is generally acknowledged in Anglo-American conflict of laws. Texas, for example, has gone further and by statute specifically empowered its courts to entertain such actions brought by citizens, and when the Texas Court of Civil Appeals adhered to old decisions denying jurisdiction over such matters⁹ the statement of Mr. Justice Frankfurter in another context comes to mind:

Legislation was read in this hostile spirit in the mid-Victorian days when it was regarded, in the main, as wilful and arbitrary interference with the harmony of the common law and with its rational unfolding by judges. This is an attitude which treats words as ends and not as vehicles to convey meaning. One had supposed that this niggardly view of the function of legislation had long since become outmoded.¹⁰

Two worthwhile articles discussed the related problem of jurisdiction over crimes committed beyond the territorial limits of the state exercising jurisdiction.¹¹

⁵ 60 Stat. 427 et seq., 15 U.S.C. § 1051 et seq. (1946).

⁶ *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952), 41 Geo. L.J. 420 (1953). The court of appeals decision was discussed in 1952 Annual Surv. Am. L. 314-15, 28 N.Y.U.L. Rev. 345-46 (1953); 27 N.Y.U.L. Rev. 519 (1952); 27 Notre Dame Law. 638 (1952); 47 N.U.L. Rev. 677 (1952).

⁷ *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909). See Note, 49 Yale L.J. 1312 (1940).

⁸ *Slater v. Mexican National R.R.*, 194 U.S. 120 (1904).

⁹ *Carter v. Tillery*, 257 S.W.2d 465 (Tex. Civ. App. 1953).

¹⁰ *Pope v. Atlantic Coast Line R.R.*, 345 U.S. 379, 390 (1953) (dissenting opinion), discussed p. 47 *infra*.

¹¹ Delaume, *Jurisdiction over Crimes Committed Abroad: French and American Law*, 21 Geo. Wash. L. Rev. 173 (1952); Fenston & De Saussure, *Conflict of Laws in*

Service of Process.—The impact of the familiar type of statute, providing for service of process on nonresident motorists in actions arising out of accidents in the forum, on the federal venue statute was examined by the Supreme Court of the United States. After an accident in Kentucky a suit was filed in a United States district court in Kentucky by an Illinois resident against Indiana residents. The latter moved under Section 1391(a) of the Judicial Code¹² for dismissal for improper venue, although no question was raised as to the compliance with the Kentucky nonresident-motorist statute¹³ on the part of the plaintiff. This motion was overruled by the trial court, whose judgment for the plaintiff was affirmed by the sixth circuit.¹⁴ The first¹⁵ and third circuits¹⁶ had held that under these circumstances the federal venue statute governed in the absence of an actual as against an implied appointment of the secretary of state as agent to receive service of process for the defendants.

To Mr. Justice Frankfurter, who wrote the majority opinion reversing the lower court, "This is a horse quickly curried."¹⁷ Not denying that jurisdiction over the nonresident defendants could be obtained under the nonresident-motorist statute, he went on to hold that nevertheless the defendants could still insist upon their privilege of obtaining dismissal for improper venue. Mr. Justice Frankfurter's steed was less tractable in the hands of the dissenting justices; to them the *Neirbo* case¹⁸ was not distinguishable on the mere fact that there the defendant had been compelled to designate the secretary of state as agent to receive service of process prior to being permitted to do business in the state rather than being permitted to act within the state on the basis of such an appointment being implied. The result of the majority opinion will not promote uniformity of rules on venue in federal courts.¹⁹

A state court faced with the problem of whether a nonresident motorist, jailed as a result of an automobile accident, would be immune from service of civil process in an action arising out of the same accident decided that no basis for the immunity existed.²⁰

the Competence and Jurisdiction of Courts of Different States to Deal with Crimes Committed on Board Aircraft and the Persons Involved Therein, 1 McGill L.J. 66 (1952).

¹² 28 U.S.C. § 1391(a) (Supp. 1952).

¹³ Ky. Rev. Stat. §§ 188.020, 188.030 (1943).

¹⁴ *Olberding v. Illinois Cent. R.R.*, 201 F.2d 582 (6th Cir. 1953).

¹⁵ *Martin v. Fischbach Trucking Co.*, 183 F.2d 53 (1st Cir. 1950), 1950 Annual Surv. Am. L. 770; 1951 id. at 784.

¹⁶ *McCoy v. Siler*, 205 F.2d 498 (3d Cir. 1953).

¹⁷ *Olberding v. Illinois Cent. R.R.*, 74 Sup. Ct. 83, 85 (1953).

¹⁸ *Neirbo Co. v. Bethlehem Corp.*, 308 U.S. 165 (1939).

¹⁹ See Note, Problems Involved in Actions against the Personal Representative of Deceased Nonresident Motorists, 32 Neb. L. Rev. 448 (1953).

²⁰ *State ex rel. Sivnksty v. Duffield*, 71 S.E.2d 113 (W. Va. 1952), 3 Cath. U.L. Rev. 448 (1953).

While these courts were still grappling with problems of non-resident motorists a New York court had to consider the nonresident airline. Pursuant to a recent New York statute²¹ substituted service on the Secretary of State of New York was made in an action to recover damages for an aviation accident that took place in California near the conclusion of a flight originating in New York. The Appellate Division struck down the statute as violative of due process in attempting to establish jurisdiction over a cause of action arising outside of the state.²² Whether some other solution can be found in the case of an unscheduled airline, as was the defendant in this case, remains to be seen; it would seem undesirable to require an action in California against an unscheduled carrier when a scheduled airline would have to face suit in the notorious courts of southern New York where jury awards stagger the imagination.

In contrast at least to the spirit of the airline case is another New York decision upholding service of process through the New York Superintendent of Insurance on a cause of action only tenuously connected with New York State.²³

Colorado joined the majority of states which do not permit constructive service on nonresident defendants in annulment actions.²⁴ The United States Supreme Court has not defined the requirements of due process in this field, so that state policy alone governs.

Domicile.—A new effort to obtain from the federal courts a solution to conflicting state rulings on the domicile of a decedent failed²⁵ like previous efforts.²⁶ Other cases on domicile are of lesser interest.²⁷

Jurisdiction over Custody.—It was suggested here last year that the United States Supreme Court has probably already gone too far in the regulation of jurisdiction for divorce for it to stop with the

²¹ N.Y. Gen. Bus. Law § 250.

²² *Peters v. Robin Airlines*, 281 App. Div. 903, 120 N.Y.S.2d 1 (2d Dep't 1953) (mem.).

²³ *Zacharakis v. Bunker Hill Mut. Ins. Co.*, 281 App. Div. 487, 120 N.Y.S.2d 418 (1st Dep't), motion for leave to appeal granted, 121 N.Y.S.2d 271 (1953). See note 107 infra. Two other Appellate Division cases dealt with service of process: *Republic of China v. Pang Tsu Mow*, 281 App. Div. 1013, 121 N.Y.S.2d 134 (1st Dep't 1953) (limitations on relief available after service by publication only); *Pierce Butler Radiator Corp. v. Osder*, 281 App. Div. 516, 120 N.Y.S.2d 779 (1st Dep't 1953) (limitations on service of process outside of the state without a court order).

²⁴ *Owen v. Owen*, 257 P.2d 581 (Colo. 1953).

²⁵ *Nelson v. Miller*, 201 F.2d 277 (9th Cir. 1952). See 1948 Annual Surv. Am. L. 42 n.8 for an earlier phase of this case.

²⁶ *Hill v. Martin*, 296 U.S. 393 (1935); *New Jersey v. Pennsylvania*, 287 U.S. 580 (1932).

²⁷ *Miller's Estate v. Commissioner of Taxation*, 59 N.W.2d 925 (Minn. 1953); *In re Delaney's Estate*, 282 App. Div. 280, 123 N.Y.S.2d 255 (3d Dep't 1953); *In re Obici's Estate*, 373 Pa. 567, 97 A.2d 49 (1953). See also Note, *Domicile of Military Personnel*, 31 N.C.L. Rev. 304 (1953).

Halvey decision²⁸ in the related sphere of jurisdiction over custody of children.²⁹ The *Halvey* rule, it will be remembered, permits the forum where the child is located to modify a custody judgment of another state if the latter state could do so. In *May v. Anderson*,³⁰ recently decided by the United States Supreme Court, the custody order of the first state was included in an *ex parte* divorce judgment granted to the husband while the children were with their mother in another state. Subsequently the children were given up by the mother on the strength of the divorce judgment. It was only several years later when the children had been visiting their mother in the state she had chosen as her home that she challenged the judgment which gave their custody to their father. He undertook to enforce the judgment by means of a habeas corpus proceeding in the state where the mother lived, and in this proceeding the trial court and the intermediate appellate court held that full faith and credit must be given to the custody judgment.³¹ When the Supreme Court of Ohio denied an appeal, review by the United States Supreme Court was sought.

At this point it might be observed that what have been taken to be established rules supported these rulings. At the time of the divorce, which was itself unchallenged, the domicile of the children remained that of the father in the state of the divorce.³² Without a showing that the divorce state had the power to change this decree and a further showing of changed conditions to warrant such a change,³³ full faith and credit would be due to the custody judgment. It was the view of the majority of the Court, however, that the divorce forum lacked jurisdiction with respect to the children "to deprive the mother of her personal right to their immediate possession."³⁴

Thus it would appear that divorce, already rendered divisible from support by the *Estin* case,³⁵ is being further pulverized and can be disassociated from the custody of the children. Two dissenting opinions and one concurrence weakened the decision, like so many others. Mr. Justice Jackson made the point that

In spite of the fact that judges and law writers long have recognized the similarity between the jurisdictional requirements for divorce and custody, this decision appears to equate the jurisdictional requirements for a custody decree to those for an *in personam* money judgment. One

²⁸ *New York ex rel. Halvey v. Halvey*, 330 U.S. 610 (1947), 1947 Annual Surv. Am. L. 53-55, 122, 127-129.

²⁹ 1952 Annual Surv. Am. L. 42, 28 N.Y.U.L. Rev. 40 (1953).

³⁰ 345 U.S. 528 (1953).

³¹ 91 Ohio App. 557, 107 N.E.2d 358 (1952).

³² Goodrich, *Handbook of the Conflict of Laws* § 136 (3d ed. 1949).

³³ *New York ex rel. Halvey v. Halvey*, 330 U.S. 610 (1947).

³⁴ *May v. Anderson*, 345 U.S. 528, 534 (1953).

³⁵ *Estin v. Estin*, 334 U.S. 541 (1948).

reads the opinion in vain to discover reasons for this choice, unless it is found in the remark that for the wife "rights far more precious than property may be cut off" in the custody proceeding. The force of this cardiac consideration is self-evident. . . .³⁶

Professor Albert Ehrenzweig made a thoughtful report to the Fourth Congress of the International Law Association in Madrid on the recognition of custody decrees rendered in foreign countries,³⁷ and two authors dealt with the conflict of laws relating to custody in Kansas³⁸ and Washington.³⁹

Jurisdiction over Divorce.—A much-needed discussion of matrimonial litigation and professional ethics has been prepared by Henry S. Drinker, Chairman of the Committee on Professional Ethics and Grievances of the American Bar Association.⁴⁰ He points out that it is not improper for a lawyer to counsel clients with respect to the divorce requirements of other states but warns against participation in obtaining an obviously invalid divorce decree. With respect to the propriety of assisting a client in obtaining a "quickie" divorce, where it is clear the client has no intention of establishing a bona fide domicile in the divorce forum, Mr. Drinker reveals the astonishing fact that the Committee on Ethics has not passed on the question since long before the changes of the past decade in the law relating to jurisdiction for divorce. Although it is true that a "quickie" divorce in which both spouses participated will usually be entitled to full faith and credit, Mr. Drinker's conclusion that such a decree is valid does not necessarily follow—it may simply be protected from attack by the parties. He certainly misreads *Johnson v. Muelberger*⁴¹ when he concludes that such a decree necessarily will be binding on strangers. That will depend upon the law of the state where the decree was rendered.⁴²

The dogma of Anglo-American law that domicile and not merely physical residence forms the basis for divorce jurisdiction was unsuccessfully challenged by the Virgin Islands⁴³ in an effort to promote

³⁶ May v. Anderson, 345 U.S. 528, 540 (1953).

³⁷ Ehrenzweig, Recognition of Custody Decrees Rendered Abroad: Law and Reason versus the Restatement, 2 Am. J. Comp. L. 167 (1953).

³⁸ Johnstone, Child Custody, 1 U. of Kan. L. Rev. 165 (1953), continued from 1 id. at 37 (1952).

³⁹ Graves, Strategy for Washington Lawyers in Child Custody Suits Involving Conflict of Laws, 28 Wash. L. Rev. 87 (1953).

⁴⁰ Drinker, Problems of Professional Ethics in Matrimonial Litigation, 66 Harv. L. Rev. 443 (1952).

⁴¹ 340 U.S. 581 (1951), 1951 Annual Surv. Am. L. 45, 47-49, 127, recently applied in *Judkins v. Judkins*, 22 N.J. Super. 516, 92 A.2d 120 (Ch. Div. 1952); *Evans v. Asphalt Roads and Materials Co.*, 194 Va. 165, 72 S.E.2d 321 (1952).

⁴² *Johnson v. Muelberger*, 340 U.S. 581, 588 (1951).

⁴³ V.I. Act, May 29, 1953.

the tourist trade. An amendment to the divorce statute provided that six-weeks residence of the plaintiff would be *prima facie* evidence of domicile and another change gave jurisdiction to the court without further reference to domicile if the defendant appeared. The dismissal of a divorce action where both parties appeared and adequate evidence of domicile was not presented was followed by an appeal to the United States Court of Appeals for the Third Circuit.⁴⁴ The majority of that court decided the statute was unconstitutional as violative of the due process clause of the Fifth Amendment, although three dissenting judges echoed the earlier cry of Mr. Justice Rutledge against the whole dogma of domicile as the essential element of divorce jurisdiction.⁴⁵

The requirement of domicile therefore still stands; an earlier attack in Arkansas⁴⁶ and another possible attack in Alabama⁴⁷ also failed.

New Jersey has finally decided after seven years of litigation⁴⁸ that it is bound by the decisions of the Supreme Court of the United States, denying to a spouse who participated in an extrastate divorce decree the privilege of attacking it collaterally in the forum.⁴⁹

To return to the matter of divisible divorce,⁵⁰ the United States Supreme Court had established that, if a state's local law permits, it may award support to a wife, even after a valid extrastate divorce has been obtained by the husband.⁵¹ New York has taken advantage of this invitation by enacting such a statute, although it is applicable to any *ex parte* divorce, whether extrastate or not,⁵² and it has been held this year in the District of Columbia that local law does not authorize alimony after a divorce.⁵³ Legislation will be necessary in most states

⁴⁴ *Alton v. Alton*, 22 U.S.L. Week 2174 (3d Cir., Oct. 27, 1953). The statute before amendment had been upheld by reading "inhabitant" and "residence" as "domiciliary" and "domicile," respectively. *Burch v. Burch*, 195 F.2d 799 (3d Cir. 1952).

⁴⁵ *Williams v. North Carolina*, 325 U.S. 226, 244 (1942), 1942 Annual Surv. Am. L. 43-50.

⁴⁶ *Squire v. Squire*, 186 Ark. 511, 54 S.W.2d 281 (1932), overruled by *Cassen v. Cassen*, 211 Ark. 582, 201 S.W.2d 585 (1947). See also *Hood v. State*, 56 Ind. 263, 26 Am. Rep. 21 (1877); *Van Fossen v. State*, 37 Ohio St. 317, 41 Am. Rep. 507 (1881).

⁴⁷ Ala. Gen. Acts 1945, p. 691, amending Ala. Code tit. 34, § 29 (1940). *Jennings v. Jennings*, 251 Ala. 73, 36 So.2d 236 (1948), 1948 Annual Surv. Am. L. 46. See also *Gee v. Gee*, 252 Ala. 103, 39 So.2d 406 (1949).

⁴⁸ *Isserman v. Isserman*, 11 N.J. 106, 93 A.2d 571 (1952), 28 Notre Dame Law. 403 (1953).

⁴⁹ *Sherrer v. Sherrer*, 334 U.S. 343 (1948); *Coe v. Coe*, 334 U.S. 378 (1948).

⁵⁰ See *Rames*, *Divisible Divorce and Subtractable Support*, 6 Wyo. L.J. 277 (1952).

⁵¹ *Estin v. Estin*, 334 U.S. 541 (1948). The divorce forum must give full faith and credit to a prior support order of another state. *Summers v. Summers*, 241 P.2d 1097 (Nev. 1952), 7 Miami L.Q. 113.

⁵² N.Y. Laws 1953, c. 663.

⁵³ *Meredith v. Meredith*, 204 F.2d 64 (D.C. Cir. 1953).

if the full protection offered by the *Estin* rule against *ex parte*, extra-state divorces is to be realized.

II

LIMITATIONS ON THE EXERCISE OF JUDICIAL JURISDICTION

Full Faith and Credit.—The discussion of full faith and credit to statutes, aroused by *Hughes v. Fetter*⁵⁴ two years ago, has continued,⁵⁵ but now the Court has added limitations which keep the doctrine well within the *First National Bank* case.⁵⁶ The Court has considered the impact of a state conflict of laws rule on the full faith and credit clause.⁵⁷ Suit in the case was filed in a federal district court in Pennsylvania for damages for a wrongful death in Alabama. The district court applied, under the *Erie-Klaxon* rule,⁵⁸ the Pennsylvania conflict of laws rule which barred the suit under the Pennsylvania statute of limitations. The plaintiff contended that in failing to permit the suit which had been filed within the longer period of limitations governing the action in Alabama, there was a failure to extend full faith and credit to the Alabama statute. Mr. Chief Justice Vinson spoke for the majority:

Our prevailing rule is that the Full Faith and Credit Clause does not compel the forum state to use the period of limitation of a foreign state. . . . Our decisions in *Hughes v. Fetter* [341 U.S. 609 (1951)] and *First National Bank v. United Air Lines* [342 U.S. 396 (1952)] do not call for a change in the well-established rule that the forum state is permitted to apply its own period of limitation. The crucial factor in those two cases was that the forum laid an uneven hand on causes of action arising within and without the forum state. . . . Here Pennsylvania applies her one-year limitation to all wrongful death actions wherever they may arise.⁵⁹

The three dissenting judges, relying on the substantive-procedural analysis, found the Alabama limitation statute to be substantive and so applicable in Pennsylvania. They recognized that this view required qualifying the scope of the *Klaxon* case⁶⁰ which they proposed to do by limiting its use to contract cases. Essentially, however, the minority were critical of the present subservience of federal courts trying diversity cases to local conflict rules and their arguments point

⁵⁴ 341 U.S. 609 (1951), 1951 Annual Surv. Am. L. 50-51.

⁵⁵ See, e.g., Notes, 19 Brooklyn L. Rev. 81 (1952); 51 Mich. L. Rev. 267 (1952); 61 Yale L.J. 1206 (1952).

⁵⁶ *First Nat. Bank v. United Airlines*, 342 U.S. 396 (1952), 1952 Annual Surv. Am. L. 43, 28 N.Y.U.L. Rev. 46 (1953).

⁵⁷ *Wells v. Simonds Abrasive Co.*, 345 U.S. 514 (1953).

⁵⁸ *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938); *Klaxon v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941).

⁵⁹ *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 518-19 (1953).

⁶⁰ *Klaxon v. Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941).

up the desirability of federal rules for conflict of laws to govern all cases in federal courts.⁶¹

Whether the trend toward a genuine full faith and credit has been interrupted or not, it is too soon to tell. The sway of *Erie*⁶² clearly continues although the year witnessed the heaviest attack on it to date, the devastating historical refutation of the *Erie* doctrine by Professor Crosskey.⁶³

The Court of Appeals for the District of Columbia grappled with the paradox of the *Magnolia*⁶⁴ and *McCartin*⁶⁵ cases, that marvelous pair in which a dissenting justice in the first wrote the majority opinion in the second case on the same point of law without overruling the first. In the current case the Maryland compensation law⁶⁶ was construed by the court to foreclose additional recoveries under the compensation laws of another jurisdiction,⁶⁷ although two other courts have reached an opposite conclusion construing statutes substantially the same as that of Maryland.⁶⁸

Several state court decisions on full faith and credit are of more than ordinary interest.⁶⁹

Res Judicata.—There were several decisions in which the exercise of jurisdiction unmistakably obtained was denied because it was

⁶¹ See Dean, *The Conflict of Conflict of Laws*, 3 *Stanford L. Rev.* 388, 399 et seq. (1951).

⁶² For an interesting suggestion that *Erie* may have limited *Hilton v. Guyot*, 159 U.S. 113 (1895), see *Gull v. Constam*, 105 F.Supp. 107 (D. Colo. 1952), 38 *Cornell L.Q.* 423 (1953). Other *Erie* literature of interest includes Hill, *The Erie Doctrine in Bankruptcy*, 66 *Harv. L. Rev.* 1013 (1953); Note, *State Trial Procedure and the Federal Courts: Evidence, Juries and Directed Verdicts under the Erie Doctrine*, 66 *Harv. L. Rev.* 1516 (1953); Note, *Federal Modification of State Law; Erie and the Bankruptcy Statute of Limitations*, 62 *Yale L.J.* 479 (1953).

⁶³ 2 Crosskey, *Politics and the Constitution in the History of the United States* 865 et seq. (1953).

⁶⁴ *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430 (1943), 1943 *Annual Surv. Am. L.* 62-65.

⁶⁵ *Industrial Comm'n of Wisconsin v. McCartin*, 330 U.S. 622 (1947), 1947 *Annual Surv. Am. L.* 57, 122.

⁶⁶ *Md. Ann. Code* art. 101, § 1-83 (Flack 1951).

⁶⁷ *Gasch v. Britton*, 202 F.2d 356 (D.C. Cir. 1953), 41 *Geo. L.J.* 559.

⁶⁸ *Cook v. Minneapolis Bridge Construction Co.*, 231 *Minn.* 433, 43 *N.W.2d* 792 (1950); *Industrial Indemnity Exchange v. Industrial Accident Comm'n*, 80 *Cal. App.2d* 480, 182 *P.2d* 309 (1947).

⁶⁹ *Weldgen v. Weldgen*, 115 *N.Y.S.2d* 482 (Sup. Ct. 1952) and *Weldgen v. Weldgen*, 60 *So.2d* 35 (Fla. 1952), 7 *Miami L.Q.* 250 (1953) (same parties; contradictory rulings on full faith and credit); *Allen v. Allen*, 256 *P.2d* 449 (Okla. 1953) (full faith and credit not required for ex parte nunc pro tunc order in divorce proceedings); *Bowles v. Bowles*, 251 *S.W.2d* 774 (Tex. Civ. App. 1952) (failure to distinguish between privilege and duty of extending full faith and credit). See also 1952 *Annual Surv. Am. L.* 47, 28 *N.Y.U.L. Rev.* 45 (1953); Scoles, *Enforcement of Foreign "Non-Final" Alimony and Support Orders*, 53 *Col. L. Rev.* 817 (1953); Note, *Alimony Judgment of a Sister State*, 6 *S.W.L.J.* 320 (1952).

shown that a court of another state had already decided the same controversy between the same parties. The inquiry usually is whether or not the court of the other state in fact also had jurisdiction so that the doctrine of *res judicata* can be called into play. Even if it is found that the first court did have jurisdiction some other difficulties can arise, and frequently *res judicata* becomes intertwined with notions of full faith and credit.

In the Court of Appeals for the District of Columbia, to take one example of this mingling, a mother brought a suit for the maintenance of her children against her former husband, who had been ordered by the divorce forum to support them. The wife neither obtained a judgment for the arrears under the divorce decree in the other state, nor did she allege changed conditions which would traditionally call for a new judgment in the matter. As might be expected, the court held that the judgment of the divorce forum, under the pleadings, was *res judicata* of the issue of support of the children and therefore entitled to full faith and credit.⁷⁰ What is of special interest is the dissenting opinion of Judge Washington, who insisted that neither *res judicata* nor allegations of changed conditions should govern; he felt that the sole guide for the court should be the welfare of the children before it.⁷¹

The law defining *res judicata* may come into question. One court, in an action in New York to cancel local judgments, based on earlier judgments obtained in Vermont, on the ground that they were discharged in bankruptcy, looked to the bankruptcy laws to ascertain that judgments for wilful and malicious torts were not subject to discharge. Then, not satisfied that Vermont meant the same thing by "wilful and malicious" as the bankruptcy statute, the court proceeded to search the record in the Vermont proceedings. The dissent felt it was contrary to the doctrine of *res judicata* to go behind the record of a judgment of a court having, admittedly, jurisdiction of the parties and subject matter.⁷²

Two other cases were unusual. One dealt with the question of whether a nonsuit granted on condition plaintiff not institute suit again "in any other county" but the present forum, extended to a suit in another state.⁷³ The court decided it did not for failure specifically to so provide. The other case was on the borderline of *res judicata*. A husband sued his wife for divorce, and she counter-

⁷⁰ *Scholla v. Scholla*, 201 F.2d 211 (D.C. Cir.), cert. denied, 345 U.S. 966 (1953), 41 Geo. L.J. 439.

⁷¹ *Id.* at 214.

⁷² *Schenfeld v. Lawlor*, 281 App. Div. 265, 119 N.Y.S.2d 415 (1st Dep't 1953).

⁷³ *Howle v. Twin State Express, Inc.*, 237 N.C. 667, 75 S.E.2d 732 (1953).

claimed for an annulment on the ground that his marriage with his first wife had been "dissolved" by nothing more impressive than a Mexican mail-order divorce, pointing out that the forum had itself awarded the first wife an annulment on the basis of the void character of the Mexican decree.⁷⁴ The appellate court, in granting the counterclaim of the second wife for annulment, did not go so far as to hold that the annulment of the husband's first marriage was *res judicata*, since the parties in that action were different from those in the proceeding before it, but it opined that at least "judicial notice" should have been directed to the earlier adjudication respecting the same marriage by the same court.⁷⁵

Problems continue to appear where a cause of action arising in one state is litigated in another state with a different, or apparently different, statute of limitations applicable to the cause of action. Mention has already been made of the recent rejection by the United States Supreme Court of an effort to require the forum to extend full faith and credit to the limitation of the first state in a wrongful death action.⁷⁶ The Court has limited the play of full faith and credit here to the limitation period of the constitution of a fraternal benefit society, having the force of law in the chartering state.⁷⁷ Still generally free, therefore, to select the applicable statute of limitations according to purely conflict of laws as against constitutional rules, the courts have worked within traditional lines in the late cases. A United States district court in Arkansas⁷⁸ and the Supreme Court of Missouri,⁷⁹ for example, were able to agree, in construing similar employment contracts entered into in Arkansas with the identical employer, that the three-year limitation period of Arkansas governed.

When the forum has a statute of limitations specifically applicable to the judgments of other jurisdictions, it may still be necessary to ascertain when the extrastate judgment was rendered. Thus the Supreme Court of Georgia, examining an action in Georgia on an Ohio judgment for a lump sum for unpaid support for children, did not apply the five-year bar of Georgia, and quite correctly, even though the original support order had been handed down twenty-seven years

⁷⁴ *Newitt v. Newitt*, 282 App. Div. 81, 121 N.Y.S.2d 311 (1st Dep't 1953).

⁷⁵ *Ibid.*

⁷⁶ See note 57 *supra*.

⁷⁷ *Order of United Commercial Travelers v. Wolfe*, 331 U.S. 586 (1947), 1947 Annual Surv. Am. L. 53. This case was boldly distinguished by a trial court in New York, construing the constitution of the same society. *Sebesta v. Order of United Commercial Travelers*, 203 Misc. 379, 117 N.Y.S.2d 750 (Sup. Ct. 1952), 66 Harv. L. Rev. 1526 (1953).

⁷⁸ *Roberts v. Thompson*, 107 F.Supp. 775 (E.D. Ark. 1952).

⁷⁹ *Jenkins v. Thompson*, 251 S.W.2d 325 (Mo. 1952).

earlier.⁸⁰ The jurisdiction of the court in the matrimonial action was a continuing one and the support judgment had not become dormant in Ohio prior to the judgment for accruals.

The absence of limitation periods in so many federal statutes leaves the federal courts free to select the applicable state statute under Section 1652 of the Rules of Decision Act,⁸¹ but in applying the state statute the court is compelled to do so as a state court would do.⁸² This strange abdication of the federal courts' power to make their own conflict of laws rules and to construe on their own authority the impact of a state statute on a federal right was recently demonstrated by a district court in New Jersey, slavishly studying the state decisions.⁸³

*Forum Non Conveniens.*⁸⁴—Doubt as to the effect of Section 1404(a) of the Judicial Code⁸⁵ on the earlier Supreme Court cases, defining the powers of state courts entertaining Federal Employers Liability Act (FELA)⁸⁶ actions, was dispelled by a new decision. In the *Kepner*⁸⁷ and *Miles*⁸⁸ cases the United States Supreme Court had protected the employee's right to bring an action in a forum of his own choosing provided only that he could obtain service of process on the employer, by forbidding state court injunctions against pursuing an action in another state court or a remote federal court. The adoption of Section 1404(a) in 1948 and the reference to the *Kepner* case in the reviser's notes on the section raised the question of whether state courts could now enjoin an FELA action by one of its citizens under the same circumstances as would authorize a federal court to change the venue on the basis of *forum non conveniens*. The majority of the Court concluded that Congress had failed to express an intent to alter the *Kepner* and *Miles* rules and therefore left open to employees the broad choice of forums now available as between state courts.⁸⁹ What

⁸⁰ *Albert v. Albert*, 86 Ga. App. 560, 71 S.E.2d 904 (1952), 14 U. of Pitt. L. Rev. 125.

⁸¹ 28 U.S.C. § 1652 (Supp. 1952); *Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U.S. 390 (1906) (Sherman Act case).

⁸² *Bauserman v. Blunt*, 147 U.S. 647 (1893) (diversity case).

⁸³ *Florida Wholesale Drug, Inc. v. Ronson Art Metal Works, Inc.*, 110 F.Supp. 573 (D.N.J. 1953). See Note, Federal Statutes without Limitations Provisions, 53 Col. L. Rev. 68 (1953).

⁸⁴ See 1950 Annual Surv. Am. L. 43.

⁸⁵ 28 U.S.C. § 1404(a) (Supp. 1952).

⁸⁶ 35 Stat. 65 (1908), as amended, 53 Stat. 1404 (1939), 45 U.S.C. § 51 et seq. (1946).

⁸⁷ *Baltimore & Ohio R.R. v. Kepner*, 314 U.S. 44 (1941).

⁸⁸ *Miles v. Illinois Cent. R.R.*, 315 U.S. 698 (1942), 1942 Annual Surv. Am. L. 51, 803, 818.

⁸⁹ *Pope v. Atlantic Coast Line R.R.*, 345 U.S. 379 (1953). *Missouri ex rel. Southern Ry. v. Mayfield*, 340 U.S. 1 (1950), 1950 Annual Surv. Am. L. 44, permitted state

no one seems to have pressed lately is the archaic nature of the FELA and the forum-shopping it encourages in the light of modern principles of workmen's compensation.

III

CHOICE OF LAW

Easily the most important development in the legislative aspect of choice of law is the adoption by Pennsylvania of the Uniform Commercial Code,⁹⁰ including the controversial choice-of-law Section 1-105.⁹¹ The section in question is so phrased as to make almost any controversy which is the subject of suit in a code state subject to the provisions of the Code, despite traditional conflict of laws rules which would frequently call for the application of laws of a state more intimately connected with the transaction than the often accidental forum. The effective date of the Uniform Commercial Code in Pennsylvania is not until July 1, 1954, so it is too soon to learn from any experience there. What the federal courts in Pennsylvania will do with Section 1-105 in diversity cases staggers the imagination; in those courts the clash with the due process clause may first arise.

In New York earlier haste has been replaced with caution; the Uniform Commercial Code is being subjected to a searching study by the Law Revision Commission, and no report is expected before late 1954. No signs of federal enactment can be detected.⁹²

Professors Cheatham and Reese have published another of their thoughtful collaborations, this one discussing the policies courts may expect to bring to bear on a choice-of-law problem.⁹³ George G. Hoff contributes to choice of law an assessment of the influence of legal rules in the process,⁹⁴ continuing the analysis of last year.⁹⁵

Some steps continue to be taken to reduce rather than to refine conflict of laws. A number of states have been added to those ratifying

courts to apply local rules of *forum non conveniens* to FELA cases. Section 1404(a) has been held to apply to FELA actions in federal courts. *Ex parte Collet*, 337 U.S. 55 (1949), 1949 Annual Surv. Am. L. 46, 74, 93, 940.

⁹⁰ Pa. Stat. Ann. tit. 12A, 1953, eff. July 1, 1954.

⁹¹ The heaviest criticism is found in Rheinstein, *Conflict of Laws in the Uniform Commercial Code*, 16 Law & Contemp. Probs. 114 (1951). Goodrich, *Conflicts Niceties and Commercial Necessities*, [1952] Wis. L. Rev. 199, does not attempt to make a comprehensive rejoinder. See also Note, *Uniform Commercial Code—Conflict of Laws*, 17 Albany L. Rev. 4 (1953).

⁹² See Dean, *Conflict of Laws under the Uniform Commercial Code: The Case for Federal Enactment*, 6 Vand. L. Rev. 479 (1953).

⁹³ Cheatham & Reese, *Choice of the Applicable Law*, 52 Col. L. Rev. 959 (1952).

⁹⁴ Hoff, *The Intensity Principle in the Conflict of Laws: The Force of Legal Rules as a Factor in Selecting the Law Applicable to a Conflicts Controversy*, 39 Va. L. Rev. 437 (1953).

⁹⁵ Hoff, *Adjustment of Conflicting Rights: A Suggested Substitute for the Method of Choice-of-Laws*, 38 Va. L. Rev. 745 (1952).

various uniform state laws, although there have not been any which obtained universal adoption in 1953.⁹⁶

*Contracts.*⁹⁷—The decision of an intermediate appellate court in New York was questioned last year⁹⁸ when it applied the law of the forum to a contract entered into in Hungary and to be performed there. This apparently was done in order to avoid the impact of Hungarian currency regulations issued since the country became a Soviet satellite. The affirmance of this decision by the Court of Appeals⁹⁹ in a per curiam decision does not clarify matters, and it is difficult to see how it can be reconciled with *Holzer v. Deutsche Reichsbahn-Gesellschaft*¹⁰⁰ which applied the law of the place of making and performance under almost identical facts.

In Missouri, when the supreme court recently applied the law of the place of performance to determine the enforceability of an oral contract of employment, it chose a curious way to do so, suggesting the intricacies of *renvoi*.¹⁰¹ The contract was entered into in Massachusetts for performance in Missouri. The court examined the Massachusetts conflict of laws cases and concluded that the Massachusetts conflict of laws rule called for the application of the Statute of Frauds of Missouri, which barred enforcement of the contract. Of course, in this case, simply applying the Missouri conflict of laws rule,¹⁰² by which parties are deemed to imply the intention of applying the law of the place of performance of a contract, would have reached the same result. The practice of the court has its dangers; *renvoi* in the field of contracts can produce confusion.¹⁰³

⁹⁶ See the pocket parts in Uniform Laws Annotated. The amendment of the Uniform Reciprocal Enforcement of Support Act, §§ 4 and 7, has improved its choice-of-law rules. Over thirty-three jurisdictions have adopted the Act in a relatively brief time. See Rutherford, Pennsylvania's Uniform Support Law, 26 Temp. L.Q. 223 (1953); Note, The Missouri Reciprocal Uniform Support of Dependents Law, 20 Kan. City L. Rev. 164 (1952).

⁹⁷ See Bayitch, The Connecting Agreement: A Study in Comparative Conflict Law, 7 Miami L.Q. 293 (1953); Note, The Private International Law of Exchange Control under the International Monetary Agreement, 2 Int'l & Comp. L.Q. 97 (1953); Note, Foreign Exchange Rates in the Federal Courts: Choosing the Date of Conversion, 47 N.U.L. Rev. 389 (1952).

⁹⁸ *Sulyok v. Penzintezeti Kozpont Budapest*, 279 App. Div. 528, 111 N.Y.S.2d 75 (1st Dep't 1952), 1952 Annual Surv. Am. L. 51, 56, 28 N.Y.U.L. Rev. 49, 54 (1953); 1952 Survey of New York Law, 27 N.Y.U.L. Rev. 913 (1952).

⁹⁹ 304 N.Y. 704, 107 N.E.2d 604 (1952).

¹⁰⁰ 277 N.Y. 474, 14 N.E.2d 798 (1938); accord, *Perutz v. Bohemian Discount Bank in Liquidation*, 304 N.Y. 533, 110 N.E.2d 6 (1953), 1952 Annual Surv. Am. L. 51, 28 N.Y.U.L. Rev. 49 (1953); 53 Col. L. Rev. 747 (1953).

¹⁰¹ *Campbell v. Sheraton Corp.*, 253 S.W.2d 106 (Mo. 1952).

¹⁰² In re De Gheest's Estate, 362 Mo. 634, 243 S.W.2d 83 (1951), 1952 Annual Surv. Am. L. 51 n.95, 28 N.Y.U.L. Rev. 49 n.95 (1953).

¹⁰³ The classic American example is *University of Chicago v. Dater*, 277 Mich. 658, 270 N.W. 175 (1936).

Insurance.—The discussion of the direct-action statutes governing liability policies, raised in several cases last year,¹⁰⁴ was taken up in several notes.¹⁰⁵

In two cases, one in Louisiana¹⁰⁶ and another in New York,¹⁰⁷ the law of New York was applied to insurance contracts none too closely related to New York. In the former the principal contact with New York was that it was the site of the plaintiff's executive offices although not of its principal operations and the contract had been submitted by the parties to the New York State Superintendent of Insurance for approval, while in the latter service of process through the New York State Superintendent of Insurance was upheld on the basis of the delivery of the policy to the defendant in New York by mail and the payment of a single premium there.

Family Law.—There was a decrease in significant cases on choice of family law, although it is not clear that this is because of the achievement of greater certainty in this area. New York State resolved a conflict between subordinate courts by applying the law of the place of marriage to a marriage of an uncle and niece, void if performed in New York but permissible in Rhode Island under the circumstances.¹⁰⁸ A perfectly consistent result was reached in Massachusetts where a marriage permitted in New Hampshire, which was the place of the ceremony, was treated as void in Massachusetts; the explanation lies in the Massachusetts statute which made marriages of the type in question void if contracted by Massachusetts domiciliaries outside of the state.¹⁰⁹

A useful summary of the last fifteen years' changes in the law of marriage and annulment in Maryland appeared, bringing up to date an earlier survey.¹¹⁰

¹⁰⁴ 1952 Annual Surv. Am. L. 51, 28 N.Y.U.L. Rev. 49 (1953).

¹⁰⁵ Note, Direct Actions—Insurance Contracts, 13 La. L. Rev. 495 (1953); Note, Conflict of Laws Aspects of Direct Action Statutes, 39 Va. L. Rev. 655 (1953); Note, The Insurer as Party Defendant in Auto Accident Cases, [1953] Wis. L. Rev. 688. See also Weingartner v. Fidelity Mut. Ins. Co., 205 F.2d 833 (5th Cir. 1953).

¹⁰⁶ Freeport Sulphur Co. v. Aetna Life Ins. Co., 107 F.Supp. 508 (E.D. La. 1952).

¹⁰⁷ Zacharakis v. Bunker Hill Mut. Ins. Co., 281 App. Div. 487, 120 N.Y.S.2d 418, motion for leave to appeal granted, 281 App. Div. 1019, 121 N.Y.S.2d 271 (1st Dep't 1953). See note 23 supra.

¹⁰⁸ In re May's Estate, 305 N.Y. 486, 114 N.E.2d 4 (1953), 2 Buff. L. Rev. 325 (Appellate Division decision); accord, Stilley v. Stilley, 219 Ark. 813, 244 S.W.2d 958 (1952), 7 Ark. L. Rev. 132 (1953). The erroneous decision of the trial court was criticized in 1952 Survey of New York Law, 27 N.Y.U.L. Rev. 921 (1952). Compare Tötterman, Functional Bases of the Rule *Locus Regit Actum* in English Conflict Rules, 2 Int'l & Comp. L.Q. 27 (1953).

¹⁰⁹ Davis v. Seller, 108 N.E.2d 656 (Mass. 1952).

¹¹⁰ Strahorn, Fifteen Years of Change in Maryland Marriage and Annulment Law and Domestic Relations Procedures, 13 Md. L. Rev. 128 (1953).

Torts.—It is dogma that the law of the place of injury governs liability for it. A freak case recently involved an automobile accident on a bridge crossing the Mississippi River from Illinois to Missouri,¹¹¹ and an effort was made to show that the accident took place on the Illinois half of the bridge so that the Illinois law governing due care with respect to guests could be applied. The Missouri courts refused to permit such a showing and relied on the doctrine of concurrent jurisdiction of the bordering states, originally developed to deal with crimes committed on rivers. A less supportable exception to the rule that the law of the place of wrong will govern is found in a case from the second circuit where the majority of the court applied New Jersey law to ascertain the measure of damages for a wrongful injury in New York on the basis that it was an action by an employee against his employer under a New Jersey contract.¹¹² The exception appears to be a unique one. Two more states were added, though tentatively, by federal courts deciding diversity cases, to the majority which construe a release of a joint tortfeasor under the law of the place of injury and not the place of execution of the release.¹¹³ Likewise the law governing survival of a tort action after the death of the tortfeasor has been held to be the law of the place of injury.¹¹⁴

In the field of multistate libel there seems to be more discussion than litigation; in contrast to three new notes¹¹⁵ on the topic only a single case has been found, and that one discussed, without deciding, what the governing law would be.¹¹⁶

Workmen's Compensation.—Two decisions of the United States Supreme Court dominate the picture on liability of employers. In one the Court held that where the employer and employee, although subject to the Federal Employers' Liability Act,¹¹⁷ agree, whether explicitly or by necessary implication, to have the claim of the employee "compromised" by a state compensation authority, the employer may not come forward three years later and insist upon the exclusive cov-

¹¹¹ *Smoot v. Fisher*, 248 S.W.2d 38 (Mo., St. Louis Ct. App. 1952), 18 Mo. L. Rev. 198 (1953).

¹¹² *Landon v. United States*, 197 F.2d 128 (2d Cir. 1952), 21 Ford. L. Rev. 294 (1952).

¹¹³ *Preline v. Freeman*, 112 F.Supp. 257 (E.D. Va. 1953); *Shapiro v. Embassy Dairy, Inc.*, 112 F.Supp. 696 (E.D.N.C. 1953).

¹¹⁴ *Grant v. McAuliffe*, 255 P.2d 819 (Cal. App. 1953).

¹¹⁵ Notes: Multi-State Defamation—Constitutional Limitations on Choice of Law, 28 N.Y.U.L. Rev. 1006 (1953); Substantive Law Applied in Multistate Libel Cases, 14 Ohio St. L.J. 96 (1953); Conflict of Laws Problems in Multistate Defamation, 4 Syracuse L. Rev. 310 (1953).

¹¹⁶ *Neiman-Marcus Co. v. Lait*, 107 F.Supp. 96 (S.D.N.Y. 1952).

¹¹⁷ 35 Stat. 65 (1908), as amended, 53 Stat. 1404 (1939), 45 U.S.C. § 51 et seq. (1946).

CONSTITUTIONAL LAW AND CIVIL RIGHTS

RALPH F. BISCHOFF

LOYALTY investigations characterize the year 1953 in the minds of both the student of law and the layman.¹ Although no one great constitutional conflict of the year can be singled out, the intensity of the search for subversives and the reliance by those questioned on the constitutional protection against self-incrimination dominate the scene. Democracy's attempt to solve the dilemma between freedom and security proceeded on many fronts, including eleven separate trials against alleged second-string communists, convictions for treason as in the world-renowned *Rosenberg*² case and the request of the Attorney General, shortly after the Subversive Activities Control Board ordered the Communist party to register under the Internal Security Act of 1950,³ that twelve other groups register as Communist-front organizations.⁴ In *Wieman v. Updegraff*⁵ the Supreme Court held unconstitutional a loyalty oath which did not differentiate between innocent and knowing membership in a subversive organization. Although the result is not yet clear, the new Republican administration in Washington changed its emphasis from a check into the loyalty of an employee to a question of security risk.⁶ Most characteristic has been the reliance on the Fifth Amendment and, in many instances, dismissals from jobs because of this assertion

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¹ Some recent publications of general interest are as follows: Barrett, *The Tenney Committee* (1951); Bauer, *Commentaries on the Constitution 1790-1860* (1952); Bowle, *Hobbes and His Critics: A Study in Seventeenth Century Constitutionalism* (1952); Chamberlain, *Loyalty and Legislative Action* (1951); Countryman, *Un-American Activities in the State of Washington* (1951); Crosskey, *Politics and the Constitution in the History of the United States* (1953); Editors of *La Prensa*, *Defense of Freedom* (1952); Emerson & Haber, *Political and Civil Rights in the United States* (1952); Gellhorn, *The States and Subversion* (1952); Miller, *Crises in Freedom: The Alien and Sedition Acts* (1951); Paschal, *Mr. Justice Sutherland* (1951).

See also the following articles: Deener, *Judicial Review in Modern Constitutional Systems*, 66 *Am. Pol. Sci. Rev.* 1079 (1952); Durham, *Crosskey on the Constitution: An Essay Review*, 41 *Calif. L. Rev.* 209 (1953); Harper & Pratt, *What the Supreme Court Did Not Do During the 1951 Term*, 101 *U. of Pa. L. Rev.* 439 (1953); Kittleson & Smith, *Free Speech (1949-1952): Slogans v. States' Rights*, 5 *U. of Fla. L. Rev.* 227 (1952); O'Brian, *New Encroachments on Individual Freedom*, 66 *Harv. L. Rev.* 1 (1952); Stout, *Privileges and Immunities of National Citizenship and the Suffrage in the States*, 14 *U. of Pitt. L. Rev.* 48 (1952).

² *Rosenberg v. United States*, 346 U.S. 273 (1953).

³ 64 Stat. 1006 (1950), 8 U.S.C. §§ 137(2)(C)(i), 137-3(a) (Supp. 1952).

⁴ *N.Y. Times*, April 23, 1953, p. 1, col. 2.

⁵ 344 U.S. 183 (1952).

⁶ Exec. Order No. 10450, April 27, 1953, 18 Fed. Reg. 2489 (April 29, 1953).

of a constitutional right.⁷ During the past year, the attack against subversive influences via the new Nationality Act⁸ has resulted in an increasing number of deportations and in numerous legal decisions protecting resident aliens against arbitrary acts.⁹

Because of the current emphasis on subversive activity, other issues on civil rights or federalism are too apt to be neglected. Several cases have differentiated last year's *Burstyn*¹⁰ case on censorship.¹¹ Once again, Jehovah's Witnesses have been the vehicle for decisions on ordinances which interfered with their freedom to worship.¹² In the area of discrimination, cases have again concerned all-white juries¹³ and primaries,¹⁴ and the Supreme Court has also upheld the view that restrictive covenants cannot be indirectly enforced by a judicial award of damages.¹⁵ The federal licensing fee on the occupation of gambling was upheld by the Supreme Court as a tax¹⁶ and countless cases involved conflicts between state and federal laws. Two diametrically opposed views resulted from the Bricker Amendment on the treaty power.¹⁷

The appointment of Governor Warren, rather than an experienced judge, as Chief Justice of the United States has served to emphasize the question of the function of the judiciary and specifically of the Supreme Court in our society. Particularly is this true because of the inability of the present Court to agree on this issue of government. Too few decisions convey precise standards and a minority frequently uses the bench for an oration on civil liberties. Granting that too

⁷ A good example is in the New York City public school system. See notes 86-87 *infra*.

⁸ The Immigration and Nationality Act of 1952 (McCarran-Walter), 66 Stat. 163 (1952), 8 U.S.C.A. § 1101 et seq. (1953).

⁹ E.g., *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953); *Heikkila v. Barber*, 345 U.S. 229 (1953).

¹⁰ *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

¹¹ *Commercial Pictures Corp. v. Board of Regents of University of State of New York*, 305 N.Y. 336, 113 N.E.2d 502 (1953); *Superior Films v. Department of Education*, 159 Ohio St. 315, 112 N.E.2d 311 (1953).

¹² *Fowler v. Rhode Island*, 345 U.S. 67 (1953); *Poulos v. New Hampshire*, 345 U.S. 395 (1953).

¹³ *Avery v. Georgia*, 345 U.S. 559 (1953); *Brown v. Allen*, 344 U.S. 443 (1953).

¹⁴ *Terry v. Adams*, 345 U.S. 461 (1953).

¹⁵ *Barrows v. Jackson*, 344 U.S. 249 (1953).

¹⁶ *United States v. Kahriger*, 345 U.S. 22 (1953).

¹⁷ Sen. J. Res. 102, 97 Cong. Rec. 11344 (1951), as amended, Sen. J. Res. 130, 82d Cong., 2d Sess. (1952), 98 Cong. Rec. 921 (1952). The purpose is to impose limitations on the power of the President and Senate to make treaties and agreements with foreign countries. Thus, no treaty may abridge the rights enumerated in the Constitution; none of the constitutional powers may be vested in any international organization; no treaty shall have internal effect until approved by both House and Senate. The constitutional argument is whether such an amendment is necessary and whether it would not interfere with our international relations.

much intolerance characterizes our present society, little is contributed to a true solution of current problems by labeling communists "poor peddlars of pap and promise" or by the abuse of the Fifth Amendment.

I

COMMUNISM AND THE CONSTITUTION

Subversive Activities.—

Seven times now have the defendants been before this Court. In addition, the Chief Justice, as well as individual Justices, have considered applications by the defendants. The Court of Appeals and the District Court have likewise given careful consideration to even more numerous applications than has this Court.¹⁸

In spite of the fact that the Supreme Court never actually accepted jurisdiction over *Rosenberg v. United States*,¹⁹ it would appear from the bare recital of the above that Julius and Ethel Rosenberg had received justice under law and that, if anything, the proceedings had been "all too leaden-footed."²⁰ An analysis of Supreme Court cases during 1953 reveals that the Court, except for this case, has apparently reached a breathing space on "Red" issues. Had the *Dennis*²¹ case, with its conviction of ten Communist leaders, arisen at the same time as the Rosenberg trial, the latter might not have received the focus of publicity that it did.²² Because of this world attention, the use of the case by communists and many self-styled liberals as a *cause célèbre*, the long-drawn-out procedure and the refusal of the highest Court to grant certiorari, this case is a vehicle by which we can analyze not only criminal justice but more particularly the role of the Supreme Court as an agency of democracy. Did the procedure allow the defendants a fair trial? In this area of criminal procedure did the Supreme Court properly perform its function as the ultimate synthesizer of the right of society to protect itself against espionage and the social purpose served by freedom of speech and activity?

¹⁸ From the main opinion by Mr. Justice Clark, *Rosenberg v. United States*, 346 U.S. 273, 293 (1953).

¹⁹ *Id.* at 273.

²⁰ In his dissenting opinion filed on June 22, 1953, Mr. Justice Frankfurter emphasized that the only issue was whether the question before Mr. Justice Douglas was patently frivolous. He did not believe that the fact of long-drawn-out proceedings was material. *Id.* at 302.

²¹ *Dennis v. United States*, 341 U.S. 494 (1951).

²² Examples of the publicity and of the use of the case by communists and others are numerous. See particularly *N.Y. Times*, Jan. 1, 1953, p. 11, col. 1; Jan. 3, 1953, p. 6, col. 3; Jan. 7, 1953, p. 3, col. 1; June 18, 1953, p. 1, col. 1; June 19, 1953, p. 1, col. 1; June 20, 1953, p. 1, col. 5. For the drama of Mr. Justice Douglas' return to the Court from vacation, see *N.Y. Times*, June 18, 1953, p. 16, col. 4. For the informal statement of the Chief Justice, upholding both the right of Mr. Justice Douglas to stay execution and of the Court to overrule him, see *N. Y. Times*, July 17, 1953, p. 1, col. 5.

The very listing of the procedures used in the *Rosenberg* case, particularly as they concerned the Supreme Court, is provocative when viewed in their totality:

January 31, 1951: Indictment returned, charging conspiracy to violate Section 32 of Espionage Act²⁸ from 1944-1950, with alleged overt acts in 1944-1945.²⁴

February 25, 1952: Death sentence under the Espionage Act; upheld by the United States Court of Appeals for the Second Circuit.²⁵

October 13, 1952: Certiorari refused (Mr. Justice Black dissenting). Motion for leave to file brief of National Lawyers Guild as amicus curiae refused.²⁶

November 17, 1952: Petition for rehearing of petition for certiorari denied (Mr. Justice Black dissenting; Mr. Justice Frankfurter's memorandum indicating the meaning of a refusal of certiorari). Motion for leave to file brief of DuBois as amicus curiae denied.²⁷

February 17, 1953: Court of appeals granted stay of execution.²⁸

May 25, 1953: This stay of execution vacated by the Supreme Court; certiorari again denied (dissents by Mr. Justice Black and Mr. Justice Douglas; Mr. Justice Frankfurter adhered to memorandum on meaning of refusal to grant certiorari). Motion for leave to file brief of National Lawyers Guild and Brainin et al. as amicus curiae denied.²⁹

June 12, 1953: Application to Supreme Court for stay of execution; referred to Mr. Justice Jackson as appropriate circuit justice; referred by him to Supreme Court with recommendation that oral hearings be held by the Court on the application for stay.³⁰

June 15, 1953: By five-to-four vote, Court refused to hear oral argument. (Justices Frankfurter, Burton, Jackson, and Black dissenting; Mr. Justice Douglas, against oral argument because no new question not presented by previous requests for certiorari).³¹ By five-to-four vote, Court denied the application for stay of execution (Justices Black and Douglas would grant a stay so as to hear on

²⁸ Espionage Act of 1917, 40 Stat. 217, 50 U.S.C. § 32(a) (1946), re-enacted by 1948 Revised Criminal Code, 18 U.S.C. § 794 (Supp. 1952).

²⁴ For elements in the original case in the district court, see the opinion of the court of appeals. 195 F.2d 583 (2d Cir. 1951).

²⁵ Ibid.

²⁶ 344 U.S. 838, 850 (1952).

²⁷ 344 U.S. 889 (1952). Mr. Justice Frankfurter merely reiterated his usual statement that "there were not four members of the Court to whom the grounds on which the decision of the Court of Appeals was challenged seemed sufficiently important when judged by the standards governing the issue of the discretionary writ of certiorari."

²⁸ 200 F.2d 666 (2d Cir. 1953), affirming 108 F.Supp. 798 (S.D.N.Y. 1952).

²⁹ 345 U.S. 965 (1953).

³⁰ 345 U.S. 989, 1003 (1953).

³¹ Ibid.

certiorari; Justices Frankfurter and Jackson opposed to a denial of stay without a hearing).³² Petition for rehearing denied (Mr. Justice Black dissenting; Mr. Justice Frankfurter repeated memorandum).

June 15, 1953: At special term, motion for leave to file an original writ of habeas corpus denied (Mr. Justice Black dissenting; Mr. Justice Frankfurter wished to hear oral argument).³³

June 17, 1953: Application for stay of execution made to Mr. Justice Douglas after end of Court term, on the issue of whether the district court had power to impose the death penalty without the recommendation of jury. In view of this requirement of the Atomic Energy Act of August 1, 1946,³⁴ question raised whether latter statute applicable in this respect to Rosenberg trial. Mr. Justice Douglas held that the Court had already refused to stay execution on the issue of fair trial, but granted a stay on the second basis because he considered the question substantial and not frivolous.³⁵ Application filed by Attorney General to convene the Court in Special Session with a view to vacating the stay.

June 18, 1953: By six-to-three vote, stay entered by Mr. Justice Douglas vacated by Court. Atomic Energy Act did not limit provisions of the Espionage Act (Justices Black and Douglas dissented; Mr. Justice Frankfurter neither dissented nor concurred on basis that the claim had enough substance so that counsel and Court should have more time).³⁶

To the defendants, the question of whether the Atomic Energy Act replaced the penalty provisions of the Espionage Law was vital. In his last dissent in the case, Mr. Justice Douglas had become so certain of this that he said, "Now I know that I am right in the law."³⁷

³² *Ibid.*

³³ 346 U.S. 273 (1953). Mr. Justice Frankfurter pointed out that the disposition of an application for habeas corpus is seldom made directly by the Supreme Court. Usually such an application is transferred directly to a district court. But since in this case the substance of the allegations had already been considered by the district court (S.D.N.Y.) and the court of appeals (2d Cir.) he voted to hear argument on the application.

³⁴ Atomic Energy Act of 1946 § 10(b)(2), (3), 60 Stat. 766, 42 U.S.C. § 1810(b)(2), (3) (1946).

³⁵ Mr. Justice Douglas' opinion of June 17, 1953 is given as an appendix to the Court's opinion reversing him on June 18, 1953; see 346 U.S. 273, 313 (1953). He made it clear that the Espionage Act of 1917 allowed the imposition of the death penalty without a jury recommendation and the Atomic Energy Act of 1946 required it. The indictment charged a conspiracy to violate the former Act, with overt acts taking place in 1944 and 1945. According to Mr. Justice Douglas the Government, at the trial, showed proof of the conspiracy and additional acts in the period after the Atomic Energy Act.

³⁶ 346 U.S. 273, 303 (1953). In the author's opinion, the argument of Mr. Justice Frankfurter, taken by itself, is very persuasive.

³⁷ *Id.* at 311. He now took the definite stand that the Atomic Energy Act did

The majority of six were just as convinced that he was in error and that the latter statute did not limit the sanctions of the former. In fact, the conclusion of the Court is broadly stated and not limited to an indictment and acts of the defendants previous to the passage of the second statute. Congress simply did not intend in its peace-time Atomic Energy Act to lower the level of penalties for all persons charged with the unlawful disclosure of atomic data.

In the long run, however, this issue of statutory interpretation is of small import compared with two fundamental questions: Was the procedure followed by the Supreme Court consistent with justice according to law for these two convicted criminals? That is, did they have a fair trial, including the appellate reviews? Secondly, what of the functioning of the Supreme Court in this case as one branch of democratic government? As for the actual trial in the district court, this was reviewed and found fair by the United States Court of Appeals for the Second Circuit.³⁸ It is possible to argue, as did Mr. Justice Black, that automatic review by the Supreme Court of federal cases involving the death penalty should be provided for, but this has not been the law since 1911 and is not the practice in many states. Either in the form of petition for certiorari or requests to stay execution, the defendants had the ear of the full Supreme Court seven different times and obtained one stay from the court of appeals. Viewed in its totality, from indictment to execution, no objective critic could consider such procedures unfair.³⁹ Curiously enough, if the procedural devices available had not been so numerous, if the penalty had been effected more expeditiously, the critics of the "Left" would have been less able to revile American justice.

As an agency of democracy, it is the function of the judiciary to achieve a just result in a particular case; it is also its task, and particularly the role of the Supreme Court, to set out standards of procedure and principles of law under which that justice will usually be obtained. Not only is this important as a guide for lower tribunals and administrative officials but it is also essential if the people of democracy are to have confidence in the Supreme Court. The *Rosenberg* case, like many others in the past decade, underlines a confusion in the Court itself, both as to the fundamentals of democ-

overrule the penalty provisions of the Espionage Act—not merely that there was a substantial question.

³⁸ Judge Frank said: "Since two of the defendants must be put to death if the judgments stand, it goes without saying that we have scrutinized the record with extraordinary care to see whether it contains any of the errors asserted on this appeal." 195 F.2d 583, 590 (2d Cir. 1951).

³⁹ In refusing executive clemency, President Eisenhower stated that the Rosenbergs had received "their full measure of justice." N.Y. Times, Feb. 12, 1953, p. 1, col. 6.

racy and the function of the Court. For example, the Court rule that a challenge to a decision of the court of appeals must meet the standards governing the issue of the discretionary writ of certiorari is clear enough and, as frequently expressed by Mr. Justice Frankfurter, the effective administration of justice precludes the announcement of reasons why certiorari is not granted in a particular case or how the justices voted. The very fact that a minimum of four justices did not find the challenges to the court of appeals decision substantial enough for certiorari should result in the confident feeling that justice is being done. Does it not add confusion, then, to have Mr. Justice Frankfurter twice in the course of these proceedings repeat his well-known explanation of the meaning of a denial of certiorari and emphasize that he does not wish to imply any opinion about the challenges raised, only to add later that "it has been his unbroken practice not to note dissent from the Court's disposition of petitions for certiorari."⁴⁰

Particularly evident in the period from June 15 to June 19 was the inability of the Court to agree on any sort of a standard for even approaching the problem raised. Should the request for a stay be decided with or without oral argument? Should the stay be denied? What relation exists between the requests for a stay in execution and for certiorari and a petition for a writ of habeas corpus? Does the full Court have power to vacate a stay of an individual justice? Should the Court decide the meaning of a statute without referring the question first to the district court? Was there sufficient time for the Court to determine the meaning of the Atomic Energy Act?

The *Dennis*⁴¹ case, or the "trial at Foley Square," affected the judicial events of 1953 primarily in the large number of progeny. No less than eleven separate trials of "number 2 Communist leaders" were to be found in the various stages from indictments to sentencing and appeal.⁴² Involved in all of these was the application of the

⁴⁰ At the time of refusing a petition for rehearing on the application for stay of execution. 345 U.S. 1003, 1004 (1953).

⁴¹ *Dennis v. United States*, 341 U.S. 494 (1951). For recent comment on the free speech issue see Ernst & Katz, Speech: Public and Private, 53 Col. L. Rev. 620 (1953); Meiklejohn, What Does the First Amendment Mean? 20 U. of Chi. L. Rev. 461 (1953); also Note, 6 Vand. L. Rev. 120 (1950). An extended discussion of the criticisms on the case may be found in 1951 Annual Surv. Am. L. 76; 1952 Annual Surv. Am. L. 66, 28 N.Y.U.L. Rev. 64 (1953).

⁴² Thirteen defendants of Group 2 (New York) found guilty, N.Y. Times, Jan. 22, 1953, p. 1, col. 1. Trial of Group 9 (Seattle) commenced, N.Y. Times, April 16, 1953, p. 4, col. 7. Convictions of defendants in Group 6 (Honolulu), N.Y. Times, June 20, 1953, p. 1, col. 7. Bail for eight defendants in Group 11 (Philadelphia) set at \$225,000, N.Y. Times, Aug. 4, 1953, p. 11, col. 3. Five convicted from Group 5 (Pittsburgh), N.Y. Times, Aug. 21, 1953, p. 7, col. 2. Pleas of innocent entered by Group 10 (St. Louis), N.Y. Times, Aug. 18, 1953, p. 10, col. 5.

"clear and *probable*" danger test which a majority of the Court appeared to announce in the parent decision. Have these defendants done more than merely prophecy a revolution or expressed a belief in forceful overthrow? Have they advocated violent overthrow at a time when the danger of such is "clear and probable"? Highlighted among these cases was the refusal of the Supreme Court to review the convictions of "Group Four" in Baltimore,⁴³ the strikes which followed the convictions of "Group Six" in Honolulu,⁴⁴ and the "offer" made by Judge Dimock before pronouncing sentence in the case of "Group Two" to allow the defendants to proceed to Russia instead of to jail.⁴⁵ Two runaway New York defendants, Thompson and Steinberg, were found at a hideout in the Sierras and were promptly indicted along with those who harbored them.⁴⁶ Several other treason trials during the year resulted in convictions.⁴⁷

As a sequel to *Sacher v. United States*⁴⁸ which affirmed the conviction of the defense attorneys in the *Dennis* case for criminal contempt, the Federal District Court for the Southern District of New York suspended Isserman for two years.⁴⁹ New Jersey later permanently barred him from practice in that state⁵⁰ and the Supreme Court of the United States disbarred him from practice before that Court.⁵¹ Although mentioning that Isserman had been suspended once before for a short period, due to a conviction of statutory rape in 1925, Chief Justice Vanderbilt of New Jersey emphasized that:

The controlling consideration in reaching a determination as to the measure of discipline, however, is respondent's scandalous and inexcusable behavior in seeking to bring the administration of justice into disrepute in a trial that lasted nine months.⁵²

⁴³ *Frankfeld v. United States*, 344 U.S. 922 (1953). Mr. Justice Black and Mr. Justice Douglas were of the opinion that certiorari should be granted. See N.Y. Times, Jan. 20, 1953, p. 5, col. 1. The refusal was criticized by Meiklejohn, N.Y. Times, Feb. 1, 1953, p. 65, col. 1.

⁴⁴ N.Y. Times, June 20, 1953, p. 1, col. 7.

⁴⁵ N.Y. Times, Feb. 4, 1953, p. 1, col. 2.

⁴⁶ N.Y. Times, Aug. 28, 1953, p. 1, col. 5; Sept. 17, 1953, p. 19, col. 3.

⁴⁷ One of which was the trial of Sobell, who was connected with the Rosenberg case, N.Y. Times, Jan. 1, 1953, p. 11, col. 1. See also the Provoo trial. N.Y. Times, Jan. 6, 1953, p. 3, col. 5; Feb. 12, 1953, p. 1, col. 7.

⁴⁸ 343 U.S. 1 (1952). See 1952 Annual Surv. Am. L. 71, 28 N.Y.U.L. Rev. 69 (1953). The Supreme Court has recently agreed to review an order disbaring Sacher for professional misconduct. *Sacher v. Association of the Bar of New York*, 74 Sup. Ct. 218 (1953).

⁴⁹ Rule 5(b) of the General Rules of the District Court for the Southern District of New York allows disbarment either because of conviction of a felony or because of disbarment in another court of record.

⁵⁰ In re Isserman, 9 N.J. 269, 87 A.2d 903 (1952), cert. denied, 345 U.S. 927 (1953).

⁵¹ In re Isserman, 345 U.S. 286 (1953).

⁵² In re Isserman, 9 N.J. 269, 279, 87 A.2d 903, 907 (1952).

This decision to disbar in New Jersey was in effect upheld by a six-to-two vote of the United States Supreme Court in refusing certiorari. According to the dissenters, Mr. Justice Black and Mr. Justice Douglas, Isserman was not afforded due process because he did not have an adequate opportunity to confront witnesses and offer evidence. Under rules of the Supreme Court,⁵³ the New Jersey disbarment operated to force Isserman to show cause why he should not also be disbarred before the Supreme Court and it was held in a four-to-four decision that he had not sustained the burden. The "Majority," consisting of the Chief Justice and Justices Reed, Burton and Minton, emphasized the general premise that there "is no vested right in an individual to practice law" and that in view of the New Jersey decision and the relation of the Supreme Court rule to it, Isserman had not carried his burden of proof. Contrary to this, the "Minority" of Justices Jackson, Black, Frankfurter and Douglas argued that the attorney had not been convicted of a conspiracy to obstruct justice and that for criminal contempt he had already been sufficiently punished.⁵⁴

The Communists: Registration or Outlawing?—Foreign students have often asked why we in the United States insist so often on meeting our constitutional problems indirectly, on a tangent so to speak. Why should the national Government bother with the "fiction" of interstate commerce? And, in the area of security, why not outlaw the Communist party? In enacting the Internal Security Act of 1950,⁵⁵ the Congress considered this possibility but chose instead the method of registration on the theory that outlawing would drive the party underground. Whether Congress chose wisely, or whether President Truman, who unsuccessfully vetoed the Act, was right in saying that

⁵³ For rule to show cause see Journal U.S. Sup. Ct. 222 (June 2, 1952). Rule 2 of the Supreme Court reads as follows:

"It shall be requisite to the admission of attorneys or counsellors to practice in this court, that they shall have been such for three years past in the highest court of a State, Territory, District, or Insular Possession, and that their private and professional characters shall appear to be good.

* * *

"Where it is shown to the court that any member of its bar has been disbarred from practice in any State, Territory, District, or Insular Possession, or has been guilty of conduct unbecoming a member of the bar of this court, he will be forthwith suspended from practice before this court, and unless, upon notice mailed to him at the address shown in the clerk's records and to the clerk of the highest court of the State, Territory, District or Insular Possession, to which he belongs, he shows good cause to the contrary within forty days he will be disbarred."

⁵⁴ The dissenters also point to findings of contempt against such zealous lawyers as Elihu Root and David Dudley Field, neither of which was followed by disciplinary proceedings.

⁵⁵ 64 Stat. 1006 (1950), 8 U.S.C. §§ 137(2)(C)(i), 137-3(a) (Supp. 1952).

the statute was unenforceable, is still for the future to answer. At least Congress intended the statute as a supplement and not a replacement for the older laws on espionage and sedition,⁶⁶ or the Smith Act of 1940⁶⁷ on subversive activities. To meet the challenge of the very methods of communism, to prosecute better for treason or conspiracy or subversive action, communists and those who knowingly associate with them must be publicly labeled and known.

Although the 1950 statute is the predecessor for the much-disputed 1952 McCarran-Walter Act⁶⁸ in strengthening our borders against aliens with a Communist taint, and although the earlier statute also contains highly unique sections on the detention of *probable* conspirators in a time of national emergency,⁶⁹ the best-known provisions are those requiring the registration of Communist-action and Communist-front organizations. If President Truman meant by unenforceability that no organization would voluntarily register under the Internal Security Act he was correct. Following the procedure of the Act, the Attorney General requested the Subversive Activities Control Board (SACB) to order the Communist party to register as a Communist-action organization directly controlled by Russia. As a result of extensive hearings during 1951 and 1952, and a recommendation by a two-man panel in October 1952, the SACB made such an order in April 1953.⁷⁰ Two days after this decision, the Attorney General asked the Board to order twelve other organizations to register under the Act⁷¹ as Communist-front organizations, and hearings have progressed during the spring and summer.⁷² Because of the statutory appeal allowed the Communist party, no "final order"

⁶⁶ E.g., the Sedition Act of 1798; the Espionage Act of 1917, 40 Stat. 217 (1917), repealed by 62 Stat. 862 (1948); the Sedition Act of 1918, 40 Stat. 533 (1918), repealed by 62 Stat. 862 (1948). In re-enacting the substance of the earlier statutes, Congress indicated an intention to continue essentially without change the punishment for those offenses.

⁶⁷ 54 Stat. 670 (1940), as amended, 62 Stat. 808 (1948), 18 U.S.C. § 2385 (Supp. 1952).

⁶⁸ The Immigration and Nationality Act (McCarran-Walter), 66 Stat. 163 (1952), 8 U.S.C.A. § 1101 et seq. (1953).

⁶⁹ For a comment on this aspect see 1952 Annual Surv. Am. L. 75, 28 N.Y.U.L. Rev. 73 (1953).

⁷⁰ See N.Y. Times, April 4, 1953, p. 1, col. 2; also, for final arguments before the SACB, N.Y. Times, Jan. 8, p. 16, col. 3.

⁷¹ Labor Youth League, International Workers Order, Jefferson School of Social Science, United May Day Committee, Civil Rights Congress, American Committee for the Protection of Foreign Born, National American-Soviet Friendship Council, Joint Anti-Fascist Refugee Committee, Veterans of the Abraham Lincoln Brigade, African Affairs Council, Committee for a Democratic Far Eastern Policy, American Slav Congress. N.Y. Times, April 23, 1953, p. 1, col. 2.

⁷² Hearings for most of the groups were set for May and August 1953. N.Y. Times, May 8, 1953, p. 15, col. 2; May 15, 1953, p. 4, col. 4; Aug. 1, 1953, p. 12, col. 3.

of registration has yet been made in any case and no question of penalties has yet arisen. Questionable it is whether even after a "final order" the Communist party will register, in which case each member must register or, in the alternative, be ordered to register after the usual hearings. Thus, partly because the procedure is one of due process the practical effectiveness of the statute is doubtful.

Meanwhile, many states have passed either similar registration requirements or, in the alternative, statutes outlawing membership in the Communist party or other subversive groups.⁶³ *Albertson v. Millard*⁶⁴ involved the Michigan Communist Control Bill which required the registration of communists, the Communist party and Communist-front organizations with a statutory definition for each given by the legislature. Only five days after the act became law it was challenged by the Executive Secretary of the Michigan Communist party on the ground of vagueness. On appeal from a denial of injunction by the federal district court, the Supreme Court of the United States, Justices Black and Douglas dissenting, remanded the cause to await interpretation of the statute by the state courts. Postponed, therefore, is not only a decision on the due process issue but also the entire question of the allowable scope of such statutes in view of the federal law. Granted that a state may require a loyalty oath of its teachers and employees, or that it may refuse a place on the ballot to any group properly designated by federal authorities as subversive, may it outlaw the Communist party or require duplicate registration? Especially since Congress discarded proscription for registration, may a state employ the former method? The dissent in the lower federal court in the *Albertson* case emphasized conflict with the national Government's control over foreign affairs as well as the absence of procedural due process in the Michigan law.⁶⁵

Loyalty Programs.—Someone has said quite accurately, "We are a nation of joiners." Strongly entrenched in our whole democratic system is also an abhorrence of "guilt by association." To label any particular loyalty program as founded on this point of view is to condemn it in the mind of the public. Mr. Justice Clark pointed out in the recent Oklahoma loyalty oath case⁶⁶ that many of us joined in

⁶³ See, particularly, Gellhorn, *The States and Subversion* (1952). See also Note, 66 Harv. L. Rev. 327 (1952); Decision, 21 Geo. Wash. L. Rev. 377 (1953).

⁶⁴ 345 U.S. 242 (1953).

⁶⁵ 105 F. Supp. 635, 647 (E.D. Mich. 1952).

⁶⁶ *Wieman v. Updegraff*, 344 U.S. 183 (1952). This case was decided on Dec. 15, 1952, and hence was only briefly mentioned in 1952 Annual Surv. Am. L. 78, 28 N.Y.U.L. Rev. 76 (1953). For recent Notes or Comments see 21 Geo. Wash. L. Rev. 486 (1953), 28 Ind. L.J. 520 (1953), 51 Mich. L. Rev. 1076 (1953), 28 Notre Dame Law. 406 (1953), 25 Rocky Mt. L. Rev. 395 (1953), 22 U. of Cin. L. Rev. 243 (1953).

all innocence an organization which was then or has since become "suspect":

They had joined, [but] did not know what it was; they were good, fine young men and women, loyal Americans, but they had been trapped into it—because one of the great weaknesses of all Americans, whether adult or youth, is to join something.⁶⁷

Also, it seems to me, indelibly marked as American characteristics are the desire for fair play and the assumption of a right of privacy. We instinctively react against star chamber proceedings and many who rely on the privilege of the Fifth Amendment are doing so not so much from a fear of incrimination as from a feeling of irritation. "What right do you have to ask me about my associations or beliefs?" Often the Fifth Amendment is confused with a right of silence under the First. It should also be noted that loyalty programs are merely one of many methods used to protect our security and that a great variety of such loyalty programs exist. Treason laws and sedition acts, anti-subversive legislation like the Smith Act, grand jury or legislative investigations of subversive influences in this or that area of American life, reinforced immigration laws and loyalty programs—all purpose to "fight fire with fire" and to protect our way of life against the sneak attacks, the boring from within and the coup d'états of a small and militant minority.

Most loyalty programs may be classified as follows:⁶⁸ (1) strictly security regulations, such as would be found at an atomic energy installation; (2) loyalty oaths, particularly as required of public employees and teachers; (3) loyalty investigations of government employees requiring no special oath, as for example, the federal program or that followed under the Feinberg Law in New York; (4) investigations of private employees, particularly teachers in privately endowed colleges and universities. Of these, only the first, security regulations of a military nature, have not been in the focus of public attention and will not be discussed here. The others have as a forebear the war-time civil service regulations first promulgated in 1942 and under which the administrative standard was whether there existed "a reasonable doubt" as to an individual's loyalty to the United States.

Much of the judicial opinion in this area of loyalty procedures bears the imprint of intemperance, the strong hint of bias and all the earmarks of a political rather than a legal attitude. Yet, it is the courts

⁶⁷ 344 U.S. 183, 190 (1952).

⁶⁸ General articles of value on the subject of loyalty oaths include the following: Byse, A Report on the Pennsylvania Loyalty Act, 101 U. of Pa. L. Rev. 480 (1953); Horowitz, Report on the Los Angeles City and County Loyalty Programs, 5 Stan. L. Rev. 233 (1953); Schwartz, Civil Liberties and the "Cold War" in the United States, 31 Can. B. Rev. 392 (1953).

which have been asked to demarcate the constitutional line between security and freedom, which again raises the question of the degree to which the judiciary is able to synthesize the requirements of national security with the fundamentals of democracy. To focus on the critical issues, it is necessary to make certain assumptions: Clearly, no government need employ those who are intentionally and actively disloyal. Even Mr. Justice Black would probably agree that a teacher who uses his position to indoctrinate his pupils with the idea of forceful revolution "as speedily as possible" should not be retained in his position.⁶⁹ Overt acts of treason and of disloyalty are a basis for dismissal of a government employee. At the opposite extreme, an individual's belief, not translated into illegal action, in the rightness of a sort of utopian socialism, is neither punishable nor a cause for dismissal. Sufficiently adult students must be educated in the alternative ways of life so that our own way is forced to meet the competition of the market place. Although some will disagree, I think we also have to assume that members of the Communist party, and those who are sympathizers, are a minority who wish to attain power by any forceful or conspiratorial means and who have no faith that their ideas can survive through democratic persuasion. They are not seekers after truth. How can one find the true villains in this drama of revolution, and their accomplices, many of them innocent dupes, without harsh procedures and an undesirable smearing of the innocent? How can one ferret out the dangerous without a consequential "thought control" over others? Clearly, the problem is not solved by simply labeling communists "miserable merchants of unwanted ideas,"⁷⁰ or "poor peddlars of pap and promise."⁷¹ Is it not also agreed that, even if a job is a "privilege," the holder cannot be arbitrarily removed and that the loss of a job is very real if not traditional punishment? One final assumption should be: let us constantly differentiate the issue of the desirability and effectiveness of any loyalty program from its legality; judicial action is essentially negative in its persuasion.

One recent case before the Supreme Court of the United States, *Wieman v. Updegraff*,⁷² sheds considerable light on the problem of "guilt by association" because it declared the Oklahoma loyalty oath illegal on that basis. The Court here reversed a decision of the Supreme Court of Oklahoma on the very ground that the oath involved

⁶⁹ Although according to their dissent in *Adler v. Board of Education*, both Justices Black and Douglas would apparently allow a communist to teach as long as the classroom was not used for subversive indoctrination. 342 U.S. 485, 508 (1952).

⁷⁰ Justice Douglas in *Dennis v. United States*, 341 U.S. 494, 589 (1951).

⁷¹ See Antieau, *Dennis v. United States—Precedent, Principle or Perversion?*, 5 Vand. L. Rev. 141, 145 (1952).

⁷² 344 U.S. 183 (1952).

failed to differentiate between innocent and knowing association with subversive organizations. The oath⁷³ contained the usual statement about "support and defend" and an affirmation that the individual *is* not a member of any organization which *now* advocates the overthrow of the government by force nor is affiliated with any group officially determined to be a subversive organization. Included also, however, was the statement that within five years preceding the affirmation he had not been a member of a group officially determined to be subversive. The Supreme Court of Oklahoma upheld an injunction brought by a taxpayer against paying certain members of the faculty of Oklahoma Agricultural and Mechanical College who had failed to take the oath.⁷⁴ In so doing, the court interpreted the official lists of organizations referred to as lists in existence at the time of passage of the Act and, therefore, incorporated into the oath by reference, but it also refused the appellant's plea for permission to take the oath as so interpreted. Oklahoma was, therefore, interpreting its oath to mean that "within five years previous to this oath I have not been a member of any group on the official list of subversive organizations at the time of the passage of the act." Although it might have been possible to imply from this that *scienter* was necessary, the refusal to let the appellants take the newly interpreted oath amounted to a holding that knowledge was not a factor. The mere fact of association disqualified a person.

Together with other cases decided by the Supreme Court in

⁷³ "And I do further swear (or affirm) that I do not advocate, nor am I a member of any party or organization, political or otherwise, that now advocates the overthrow of the Government of the United States or of the State of Oklahoma by force or violence or other unlawful means; That I am not affiliated directly or indirectly with the Communist Party, the Third Communist International, with any foreign political agency, party, organization or Government or with any agency, party, organization, association, or group whatever which has been officially determined by the United States Attorney General or other authorized agency of the United States to be a communist front or subversive organization; nor do I advocate revolution, teach or justify a program of sabotage, force or violence, sedition or treason, against the Government of the United States or of this State; nor do I advocate directly or indirectly, teach or justify by any means whatsoever, the overthrow of the Government of the United States or of this State, or change in the form of Government thereof, by force or any unlawful means; that I will take up arms in the defense of the United States in time of War, or National Emergency, if necessary; that within the five (5) years immediately preceding the taking of this oath (or affirmation) I have not been a member of the Communist Party, the Third Communist International, or of any agency, party, organization, association, or group whatever which has been officially determined by the United States Attorney General or other authorized public agency of the United States to be a communist front or subversive organization, or of any party or organization, political or otherwise, that advocated the overthrow of the Government of the United States or of the State of Oklahoma by force or violence or other unlawful means"

⁷⁴ Board of Regents v. Updegraff, 205 Okla. 301, 237 P.2d 131 (1951).

recent years upholding a particular oath or various qualifications for a position, the negative result in the *Updegraff* case helps considerably to mark the legal line between freedom of association and the "privilege" of public employment on the one hand and the necessary legislative flexibility in meeting the competing problem of national security. Thus, it is implicit in all the cases that there is no abstract right to public employment in the same sense of the right of free speech. As stated in *United Public Workers v. Mitchell*⁷⁵ on the Hatch Act and *Adler v. Board of Education*⁷⁶ on the Feinberg Law and loyalty in New York, an individual cannot lay down his own terms of employment nor may the state make them arbitrary or unreasonable. Could Congress dictate that no Democrats or Negroes or Protestants hold public office? The *Adler* decision also indicated that scienter is necessary and that membership in a listed organization may have a prima facie evidentiary use.⁷⁷ Even past membership may be prima facie evidence of unfitness at least where an individual has the opportunity to rebut. Also, in upholding the Los Angeles ordinance in *Garner v. Board of Public Works*,⁷⁸ the Court did so because it felt knowledge was an implicit requirement.

With "guilt by association" in the innocent sense barred, two very important issues remain. One is illustrated by the question so often asked by an investigating committee: "Have you ever in the past been a member of a subversive organization (knowing that it is such)?" This question fits the situation where a witness had been a member of a Communist group but later reversed his own attitude.⁷⁹ Even more fundamental is the second problem: Who shall determine this list of subversive associations? One of the most contentious issues in the federal loyalty program instituted under President Truman was the procedure whereby the Loyalty Review Board was furnished by the Department of Justice with the names of groups, which the Attorney General after "appropriate investigation" designated as subversive. In the spring of 1953, Attorney General Brownell, for the new Republican administration, redesignated 162 groups and also added 62 new ones to the Justice Department's list.⁸⁰ Of particular interest

⁷⁵ 330 U.S. 75 (1947).

⁷⁶ 342 U.S. 485 (1952).

⁷⁷ The *Adler* case was a request for a declaratory judgment and injunction and involved the constitutionality of the Feinberg law on its face. It, therefore, did not include a holding on its administration.

⁷⁸ 341 U.S. 716 (1951).

⁷⁹ It is this question which troubled Mr. Justice Frankfurter in the *Adler* case. He felt it was far from clear whether mere past membership in a proscribed organization will of itself be sufficient to bar a person from a school position.

⁸⁰ N.Y. Times, April 30, 1953, p. 19, col. 1. Of these nineteen contested, twenty did not, and twenty-three notices were returned unclaimed. N.Y. Times, July 22, 1953, p. 4, col. 1.

to lawyers, he later served notice on the National Lawyers Guild to show cause why it should not be listed.⁸¹ Because of the decision in the 1951 case of *Joint Anti-Fascist Refugee Committee v. McGrath*,⁸² each association was given an opportunity to contest and the right to a hearing. Designating a group as subversive drastically restricts its functions and is therefore a punishment which cannot be inflicted without due process. To this degree, the Court has answered the problem of fair procedure for the organizations themselves.

Although many of the states have created their own loyalty procedures, both with and without an oath, that of the Federal Government and of New York need particular analysis because of developments in 1953. It will be recalled that during the war, the Civil Service Commission investigated some government personnel in order to decide whether "reasonable doubt of loyalty" existed. This program was augmented in March 1947 by President Truman's executive order⁸³ under which an individual applicant or employee was investigated to determine on all the evidence whether reasonable grounds of his disloyalty existed. In the procedure created, the particular agency involved was important because it brought the charges and a hearing was possible before an agency loyalty board of not less than three, with appeal to the agency head and ultimately to a central Loyalty Review Board for all the agencies. Two chief difficulties evolved: Disloyalty was rather vaguely defined, particularly because one factor which could be taken into consideration was "guilt by association," and the definition of a subversive organization was itself vague. Secondly, although a hearing was required, the individual had no right to be confronted with the case against him. In an "anonymous" four-to-four decision, the Supreme Court held in *Bailey v. Richardson*⁸⁴ that traditional due process did not apply to the privilege of a government job. Some of the criticisms of this federal program have been met during 1953 by a completely revised plan instituted by executive order of President Eisenhower.⁸⁵ The old standard emphasizing disloyalty has been scrapped in favor of the question: is the employment of this person on this job consistent with the interests of national security? In theory this standard could yield greater strictness in the more vulnerable areas of government and fewer dismissals in less sensitive zones, but much will depend on the administrative definition of security risk. The Eisenhower procedural pattern

⁸¹ N.Y. Times, Aug. 28, 1953, p. 1, col. 4.

⁸² 341 U.S. 123 (1951).

⁸³ Exec. Order No. 9835, March 21, 1947, 12 Fed. Reg. 1935 (March 25, 1947).

⁸⁴ 341 U.S. 918 (1951).

⁸⁵ Exec. Order No. 10450, April 27, 1953, 18 Fed. Reg. 2489 (April 29, 1953).

differs in that the particular agency is more responsible for answering the question. Replacing the old Loyalty Review Board is a final appeal to the agency or departmental head, with an intermediate hearing before a three-man Security Hearing Board, outside the agency, picked by the agency head from a list maintained by the Attorney General. The *Bailey* decision would indicate that there is no legal question of fair play involved; the issue is one of desirability.

The developments in the New York picture have been both within and without the Feinberg Law. *Adler v. Board of Education*⁸⁶ decided in 1952 in a declaratory judgment action that this law was constitutional on its face, that is, that the procedure outlined for disqualifying persons from teaching in the public school system was due process. The core of this amendment to the State Education Law is that the Board of Regents is to publish a list of subversive organizations, after due hearing and review, and that membership in such is to be prima facie evidence of disqualification. During much of 1953, therefore, the Regents have been implementing the Feinberg Law through hearings prefatory to establishing such a list of subversive organizations, but only in late September was the Communist party listed as such.⁸⁷ Meanwhile, the Superintendent of New York City Schools, proceeding under the Charter and outside the Feinberg Law, inquired into the teaching competency of "suspect" teachers, with consequent suspensions and dismissals in some cases. One dominating feature of this procedure was the suspension of those who refused to answer questions on Communist ties and who relied on the "no self-incrimination" clause. After the right to ask this question was affirmed by the New York Supreme Court and the Appellate Division,⁸⁸ the suspended teachers were offered a second opportunity and those who continued not to answer were dismissed. In like view, a California law specifically requires dismissal for those who refuse to answer the questions of investigating groups.⁸⁹

The criticism that such investigations of the teaching profession and the requirement of loyalty oaths impose a "thought control" on the innocent is intense and has validity. Particularly is this true at the university level where the tradition of academic freedom superimposes itself on the usual questions of desirability and constitutionality, and in the case of private institutions where it is the dominant issue. On the one side are most university heads who start from the premises that academic freedom is not a value in itself but a means to an end,

⁸⁶ 342 U.S. 485 (1952).

⁸⁷ N.Y. Times, Sept. 25, 1953, p. 1, col. 1, p. 10, col. 3.

⁸⁸ N.Y. Times, May 5, 1953, p. 20, col. 3; June 16, 1953, p. 23, col. 2.

⁸⁹ N.Y. Times, Sept. 10, 1953, p. 15, col. 5.

the search for truth, and that the very nature of a Communist organization makes such an objective impossible for a sympathizer. Opposing are those who assert that investigations and dismissals can smother the inquiring mind of a whole faculty; even avowed communists should be allowed to teach so long as they do not use the podium for indoctrination, or so long as they are "competent."⁹⁰ Many universities, during this past year, discussed a plan of action should they be investigated, as some have been by various congressional subcommittees. Should the professors be advised not to plead the Fifth Amendment or should they merely be educated as to its meaning and function?

The legal position of most loyalty programs by the end of 1953 is clear, although its attainment has placed considerable strain on the judicial demeanor of the Supreme Court of the United States. Even as late as the *Wieman v. Updegraff* decision, some members of the Court seemed to confuse the desirability of loyalty procedures with their legality and thus to contribute to the impression that for some of them the Court's function is that of a super-legislature. Particularly the concurring opinions are eloquent essays on the necessity of freedom for the unorthodox doctrine or for "free play of the spirit," but they do not help demarcate the legal standard. What does Mr. Justice Black mean when he says that "the right to speak on matters of public concern must be wholly free or eventually be wholly lost"?⁹¹

Freedom of Speech, Investigating Committees, and the Right against Self-Incrimination.—Someone opening the cornerstone box of a building begun in 1953 will, I am sure, decide that everyone and everything was being investigated and that the United States was fast approaching a totalitarianism under the guidance of certain legislative committees. Among those investigated have been public school teachers, universities, the Church, foundations, the State Department, United Nations personnel, the Justice Department, and television.⁹² The cornerstone should also reveal a great reliance by

⁹⁰ Thus, Justices Douglas and Black dissenting in the *Adler* case. 342 U.S. 485, 508 (1952). Professor Einstein is in this group, N.Y. Times, June 12, 1953, p. 1, col. 6, as well as the late Senator Taft.

⁹¹ *Wieman v. Updegraff*, 344 U.S. 183 (1952).

⁹² Many of the investigations during 1953 have been carried out by Senate Subcommittees on Internal Security and by the ancient House Committee on Un-American Activities. For specific references, see the following: assertion that Protestant clergy includes the largest group of Communist sympathizers in the United States, N.Y. Times, July 3, 1953, p. 1, col. 4; committee to investigate foundations approved by the House, N.Y. Times, July 28, 1953, p. 1, col. 2; Justice Department finds no basis for indicting Senator McCarthy for violating election laws, N.Y. Times, Sept. 6, 1953, p. 1, col. 3; areas of inquiry between Jenner, Velde, and McCarthy investigations, N.Y. Times, Feb. 4, 1953, p. 11, col. 5; McCarthy indicates there will be no probe of lawyers

all sorts and varieties of witnesses on the Fifth Amendment, on the right against self-incrimination, and an increasing attitude on the part of the general public that reliance on the amendment is being abused.⁹³ "Was not the amendment aimed at ancient inquisitions which couldn't happen here?"

Common to both loyalty inquiries and legislative investigations is a "hands off" policy on the part of the courts. Where in the case of government employees this judicial attitude is largely the result of the conception that a job is a privilege for the executive to control, in the matter of committee investigations, it is due to the traditional disinclination of the courts to interfere with congressional procedures. As Mr. Justice Frankfurter said in the 1953 case of *United States v. Rumely*:

Whenever constitutional limits upon the investigative power of Congress have to be drawn by this Court, it ought only to be done after Congress has demonstrated its full awareness of what is at stake by unequivocally authorizing an inquiry of dubious limits. Experience admonishes us to tread warily in this domain.⁹⁴

Contact between congressional committees and the courts comes usually on the issue of contempt⁹⁵ and in the past year such cases have focused on the following traditional questions: (1) Is the inquiry so broad, so much a "fishing expedition," that it is clearly not for a legislative purpose and thus contravenes the First Amendment? (2) Who is to determine whether a witness may incriminate himself when he asserts his privilege, and what is the standard to be applied? (3) Does a particular immunity statute grant an immunity which is as broad as the danger of incrimination? Noticeably missing as an issue is the question of "fair play." Although various proposals have recently been made to the effect that Congress should establish a

unless requested by the ABA, N.Y. Times, June 25, 1953, p. 19, col. 4; Eisenhower orders establishment of International Organizations Employees Loyalty Board to check on United States citizens with jobs at the United Nations, N.Y. Times, June 3, 1953, p. 1, col. 7.

See also the following general articles on the subject: Liacos, Rights of Witnesses Before Congressional Committees, 33 B.U.L. Rev. 337 (1953); Driver, Constitutional Limitations on the Power of Congress to Punish Contempts of Its Investigating Committees, 38 Va. L. Rev. 1011 (1952).

⁹³ Of course others have insisted that witnesses should answer no questions from investigating committees. Considerable stir, for example, was raised by Professor Einstein's assertion that intellectuals should refuse to testify before congressional committees. N.Y. Times, June 12, 1953, p. 1, col. 6.

⁹⁴ 345 U.S. 41, 46 (1953).

⁹⁵ The power of the legislature to call a contumacious witness before the bar of Senate or House is traditional. Most contempt cases, however, arise under a statute making contempt before congressional committees a misdemeanor, punishable via the courts. 52 Stat. 942 (1938), 2 U.S.C. § 192 (1946).

procedural code so as to "restore the dignity of the individual,"⁹⁶ this has not concerned the courts, which have not enforced due process on legislative committees. On the other hand, the greater reliance by reluctant witnesses on the Fifth Amendment has caused a wave of dismissals, particularly from teaching positions, and has thus incontrovertibly emphasized that punishment of an extra-legal nature frequently follows the insistence on this civil right.

Since the 1948-1949 *Josephson*,⁹⁷ *Barsky*⁹⁸ and *Eisler*⁹⁹ type of case, little attempt has been made to challenge the legitimacy of an investigating committee, but once again this is the essence of the argument and of the Court's opinion in the recent Supreme Court case of *United States v. Rumely*.¹⁰⁰ Where the attack in the earlier cases was on the entire authority of a committee because it was a roving commission with no legislative purpose, the challenge in the *Rumely* case is on the lack of statutory power to investigate a particular field. Avoiding the implicit constitutional issue, a majority held that the House Select Committee on Lobbying Activities had no statutory authority to investigate an attempt "to saturate the thinking of the community" through the distribution of books and pamphlets. Rumely was the Secretary of the Committee for Constitutional Government (CCG) which, with the aid of contributions, distributed politically tendentious books to the public. Although the CCG and Rumely were registered under the Lobbying Act,¹⁰¹ he refused to disclose the sources of large contributions on the ground that the money was used to distribute books to the public and not to influence the passage or defeat of congressional legislation. In limiting the statutory authority of the Committee to the investigation of direct attempts to influence legislation, the Court was undoubtedly influenced

⁹⁶ Thus, Senator Douglas proposed ten rules of fair play. N.Y. Times, July 17, 1953, p. 8, col. 3. Mr. Justice Douglas has at various times, outside the court, urged the necessity for procedural reforms which would restore the dignity of the individual. N.Y. Times, May 21, 1953, p. 17, col. 1; May 22, 1953, p. 26, col. 3.

⁹⁷ *United States v. Josephson*, 165 F.2d 82 (2d Cir.), cert. denied, 333 U.S. 838 (1948).

⁹⁸ *Barsky v. United States*, 167 F.2d 241 (D.C. Cir.), cert. denied, 334 U.S. 843 (1948).

⁹⁹ *Eisler v. United States*, 338 U.S. 189 (1949). In the *Josephson*, *Barsky* and *Eisler* cases, the defendants challenged the statute on the ground of vagueness and lack of a legislative purpose. They refused to answer also on the basis of a right of silence, rather than protection against self-incrimination. This was before *Dennis v. United States* which made incrimination more possible. See Note, 28 Notre Dame Law. 373 (1953).

¹⁰⁰ 345 U.S. 41 (1953). See Note, 101 U. of Pa. L. Rev. 402 (1952).

¹⁰¹ Federal Regulation of Lobbying Act of 1946, 60 Stat. 839, 2 U.S.C. § 261 et seq. (1946).

by the "grave constitutional question" involved in the Committee's claim that it could inquire into attempts to influence public opinion.¹⁰²

If Mr. Justice Frankfurter and four of his colleagues "abstained from marking the boundaries of congressional power or delimiting the protection guaranteed by the First Amendment," no such concept of separation of powers prevented Justices Douglas and Black from once again eloquently affirming the civil right. For them, the meaning of the resolution creating the Committee is clear—the Select Committee had the power to investigate any methods used to influence legislation. Such an inquiry, however, as that made of Rumely is one into personal and private affairs, an invasion of the bid of a publisher "for the minds of men in the market place of ideas," a violation of the privilege of pamphleteering.¹⁰³ Once again, Mr. Justice Douglas talks of the "preferred position granted speech and the press by the First Amendment." Much more to be questioned is his assertion in this concurring opinion that inquiry into any matter is precluded if no valid legislation could be passed. Granting that Congress cannot regulate publishers by requiring of them a list of their clientele, does this prevent an inquiry into such a list aimed at closing the gaps in the lobbying statutes?

The almost monotonous repetition of the phrase "I refuse to answer on the ground that it may tend to incriminate me" has, of course, produced numerous cases involving the application of the privilege. When determining whether a witness is entitled to assert the privilege, a court must be governed by the facts actually in evidence as well as personal perception of the peculiarities of the case.¹⁰⁴ Also, the privilege is not waived by giving testimony in a previous independent proceeding, including a grand jury hearing.¹⁰⁵ The greater reliance on the privilege has raised anew the whole problem of immunity statutes.¹⁰⁶ Of the proposals before Congress, those which

¹⁰² Under the resolution of August 12, 1949, the House Select Committee on Lobbying Activities was authorized to investigate "(1) all lobbying activities intended to influence, encourage, promote, or retard legislation. . . ." H. Res. 298, 81st Cong., 1st Sess. (1949).

¹⁰³ Mr. Justice Douglas is extremely eloquent; e.g.: "Fear of criticism goes with every person into the bookstall. The subtle, imponderable pressures of the orthodox lay hold. . . . If the lady from Toledo can be required to disclose what she read yesterday and what she will read tomorrow, fear will take the place of freedom in the libraries, book stores, and homes of the land." 345 U.S. 41, 57-58 (1953).

¹⁰⁴ *Kiewel v. United States*, 204 F.2d 1 (8th Cir. 1953); *In re Miller*, 95 A.2d 116 (N.H. 1953).

¹⁰⁵ *United States v. Malone*, 111 F. Supp. 37 (N.D. Cal. 1953).

¹⁰⁶ *Halpin v. Scott*, 415 Ill. 104, 112 N.E.2d 91 (1953); *Zambroni v. State ex rel. Hawkins*, 64 So.2d 335 (Miss. 1953); *Ferrantello v. State*, 256 S.W.2d 587 (Tex. Crim. App. 1952); *Florida State Board of Architecture v. Seymour*, 62 So.2d 1 (Fla. 1952).

would allow the grant of immunity in judicial proceedings place the discretionary power to do so in the Attorney General and in legislative investigations with the committee concerned.¹⁰⁷ Does not the latter suggestion reinforce the existing criticism that these legislative committees are not really investigating for a legislative purpose? At least four cases during the year concerned the application of state immunity statutes.¹⁰⁸

Perhaps more characteristic of 1953 than of any previous year is the head-on collision between the right of a government employee, a public school teacher or a state university professor, to claim his privilege under the Fifth Amendment or its equivalent and the power of the government to dismiss him as a security risk for that reason. Similarly, private universities have suspended or dismissed faculty members on the sole ground that assertion of their civil right in answer to the usual question, "Are you affiliated with the Communist party?" allows the inference that one has been. Dismissal has followed under the premise that a communist is not free to search for the truth. The seeming paradox that a person can be "punished" through loss of a job because he asserts a constitutional right is only understandable on one premise: this is not punishment in the legal and constitutional sense because a job is a privilege, not a right; to require the teacher or government employee to choose between the right of silence and his job is not an arbitrary regulation.

This very contentious issue has manifested itself in many ways both outside and inside the courts. Already mentioned are the dismissals under Charter provisions of some New York City school teachers who refused to answer the question on Communist affiliation.¹⁰⁹ Other state statutes specifically provide for the dismissal of a public employee who refuses to testify on the ground of self-incrimination or who refuses to waive immunity.¹¹⁰ Some university teachers have been dismissed or have resigned, with the question raised as to whether a refusal to answer permits reasonable inferences other than that of affiliation with communism.¹¹¹ At the United Nations, investi-

¹⁰⁷ For the McCarran bill to grant witnesses immunity see N.Y. Times, July 10, 1953, p. 8, col. 7. See Note, 41 Geo. L.J. 511 (1953).

¹⁰⁸ See note 106 supra.

¹⁰⁹ See discussion under Loyalty Programs, p. 70 supra.

¹¹⁰ Note the suspension of medical licenses of Dr. Barsky and others by the New York Board of Regents because of crime of contempt of Congress. *Barsky v. Board of Regents of University of New York*, 305 N.Y. 89, 111 N.E.2d 222 (1953).

¹¹¹ The Supreme Court refused the appeal of Professor Pockman on the California loyalty oath. N.Y. Times, May 26, 1953, p. 16, col. 6. For statements on academic freedom by various university heads see N.Y. Times, Jan. 17, 1953, p. 1, col. 5; Jan. 22, 1953, p. 48, col. 7.

gation of American personnel resulted in dismissals and a tightening of federal regulations over Americans entering the service of the UN.¹¹²

One lower court case in New York, *Hamilton v. Brennan*,¹¹³ illustrates the principle that there must be some rational connection between loss of a job and the reason given for the dismissal. Here the state supreme court held it was lack of due process and arbitrary to strike a man's name from the eligible list for patrolman merely because he had signed a petition for Benjamin J. Davis, former Communist party member of the New York City Council, at the time that he was on trial for violation of the Smith Act.

Before the United States Supreme Court, *Orloff v. Willoughby*¹¹⁴ raised the allied question of whether Congress, in the Selective Service Statutes, had granted the military the power to retain a doctor in the army, and at the same time refuse to commission him or give him the usual duties of an M.D. because he relied on the Fifth Amendment. As stated by Mr. Justice Jackson for the Court, "the petitioner presents a novel case" and "in this Court the parties changed positions as nimbly as if dancing a quadrille." Orloff originally asked for habeas corpus on the ground that he was liable to induction only as a doctor and that, therefore, he must be granted the commission and duties of a doctor or else be discharged. Denying the writ, the trial judge interpreted the Universal Military Training and Service Act¹¹⁵ as giving complete discretion over job assignments to the military once a person is legally inducted and this interpretation of the Act was affirmed by the court of appeals.¹¹⁶ Within this frame of reference, it was brought out that Orloff had not been commissioned and granted the regular functions of a doctor because in filing the required loyalty certificate at the time of applying for the commission, he had refused information about association with groups on the Attorney General's subversive list.

In reaching a decision as to whether Orloff was entitled to a discharge, the Supreme Court was faced with several fundamental

¹¹² The dismissal of eleven was found illegal by a UN administrative tribunal; of these four were reinstated with back pay and seven were given back pay; nine dismissals were upheld. The essence of the decision was that "serious misconduct" was not proved solely by an assertion of the Fifth Amendment. Later the Secretary-General decided not to reinstate the four. *N.Y. Times*, Sept. 2, 1953, p. 1, col. 6; Sept. 3, 1953, p. 1, col. 5. For General Eisenhower's order see *N.Y. Times*, June 3, 1953, p. 1, col. 7.

¹¹³ 203 Misc. 536, 115 N.Y.S.2d 83 (Sup. Ct. 1953).

¹¹⁴ 345 U.S. 83 (1953).

¹¹⁵ 64 Stat. 826 (1950), amended by 65 Stat. 80 (1951), 50 U.S.C. App. § 454(i) (1) (A) (Supp. 1952).

¹¹⁶ 195 F.2d 209 (9th Cir. 1952), affirming 104 F.Supp. 14 (D. Wash. 1952).

questions. What is the relation of the judiciary, the ultimate protector of civil rights, to military control? Under the conscription statutes, how much discretion does the military have in assigning jobs? Must the case be remanded to the district court to determine whether Orloff is working at "medical activities"? Has there been illegal discrimination against the petitioner, *i.e.*, is he being punished because of his claim of privilege under the Fifth Amendment? For the majority of six speaking through Mr. Justice Jackson, it was stated that the judiciary has a clear right to release an individual from military control if he is being held contrary to law. The courts cannot, however, by a writ of mandamus, compel the army authorities to award a commission for that is in the discretion of the military authorities. Although under that section of the conscription laws applying to medical specialists, the army cannot assign the inductee to any job in its complete discretion, it is not required to do more than assign him to a job within the broad area of "medical and allied specialist categories." This allows a sufficiently wide latitude so that the courts on habeas corpus cannot determine whether a specific assignment falls within the classification. If it was a controversy for the judiciary to settle, the case would have to be remanded to the district court. Finally, in view of the discretion allowed the military by Congress, it cannot be argued that the refusal to use him as a commissioned M.D. is discriminatory, nor that it is punishment in the legal sense for his assertion of a constitutional privilege.¹¹⁷

Not only in the entire approach to the problem of court-military relations, but specifically on the interpretation of this statute, do the minority disagree with the majority. With his usual facility for interpreting a statute so as to confine the issue, Mr. Justice Frankfurter holds that under this statute, one who is drafted as a doctor may not be required to serve in a capacity other than as a commissioned M.D. and as an alternative he must be released. Conforming to practice, Mr. Justice Black, with Mr. Justice Frankfurter and Mr. Justice Douglas concurring, is not content with such "bloodless" reasoning. His dissent is once again an essay on civil liberties. Since his major premise is that civil liberties stand in a preferred position, he easily interprets the statute as not granting to the military such wide discretion. Even assuming that the wide discretion existed, the district court, not the Supreme Court, should determine whether the assignment made to Orloff fitted the requirement. He is "to be treated as a kind of pariah in order to punish him for having claimed a privilege."

¹¹⁷ The majority noted that Orloff by his petition for habeas corpus has "successfully avoided foreign service until his period of induction is almost past." 345 U.S. 83, 94 (1953).

II

ALIENS, CITIZENSHIP, AND THE MCCARRAN-WALTER ACT

Few laws have raised such a storm of protest from both "Left" and "Right" as has the Nationality Act of 1952,¹¹⁸ better known as the McCarran-Walter Act. Not only is it the most recent comprehensive enactment of our traditional immigration and nationality laws, but it is also a slightly revised edition of the nationality sections of the Internal Security Act of 1950.¹¹⁹ As such, a chief characteristic is the statute's emphasis on a "security risk" as a cause of exclusion, deportation and denaturalization. Five fields covered by the Act are of greatest importance: (1) immigration quotas; (2) exclusion of undesirable aliens; (3) deportation of undesirable aliens; (4) naturalization; and (5) denaturalization.

Much of the dispute is over the policy of the Act, which quite clearly looks at the alien as more "suspect" than heretofore. Ever since the Chinese Exclusion Act of 1882¹²⁰ people have honestly differed on our nationality policies, either on the ground that some were un-American or that others were in contradiction to our own selfish interests. The storm of protests against the newest Act, both within Congress before final passage and outside of Congress, is evidence that viewed just as policy many features are undesirable. For example, should the quota system,¹²¹ which itself favors the North European elements in our population, be modified by provisions which allow the Attorney General to grant preferences to certain groups within a quota area? Should denaturalization follow from the "concealment of a material fact," as stated in the new law, or is the old standard of "fraud" or "illegal procurement" preferable? These and a host of other questions on policy must for the moment be left to others to debate, while attention is briefly concentrated here on the legal and constitutional issues which arose in 1953.

The McCarran-Walter Act is apparently based on the philosophy that an "alien has no rights" and it is this aspect of the statute which

¹¹⁸ The Immigration and Nationality Act of 1952. It was passed over a presidential veto and became effective on December 24, 1952. 66 Stat. 163 (1952), 8 U.S.C.A. § 1101 et seq. (1953).

A particularly excellent analysis of our immigration and nationality policy can be found in a recent Note, 66 Harv. L. Rev. 643 (1953). See Report of the President's Commission on Immigration and Naturalization, which analyzed possible changes in the act. "Whom We Shall Welcome," Gov't Printing Office, Jan. 1, 1953. See also Hazard, *The Immigration and Nationality Systems of the United States of America*, 14 F.R.D. 105 (1953); Comment, 20 U. of Chi. L. Rev. 547 (1953).

¹¹⁹ 64 Stat. 1006 (1950), 8 U.S.C. § 137 (Supp. 1952).

¹²⁰ 22 Stat. 58 (1882), repealed by 57 Stat. 600 (1943). See *Chinese Exclusion Case*, 130 U.S. 581 (1889).

¹²¹ The quota system first became law in 1921. 42 Stat. 5 (1921).

bears analysis in the light of 1953 judicial decisions. To what extent is it true, to use Mr. Justice Black's phrase, that an alien's "liberty is completely at the mercy of the unreviewable discretion of the Attorney General"?¹²² From a procedural point of view, administrative discretion without limit is the dominating characteristic which chiefly differentiates this 1952 version of the nationality laws from those earlier than 1950. Thus, the Attorney General can exclude an alien when he has reason to believe that the alien intends activities "prejudicial to the public interest,"¹²³ or he may deport an alien who after entrance to the United States "has had a purpose to engage" in a forbidden political activity.¹²⁴ In cases where his action is based on confidential data, the Attorney General may exclude an alien without a hearing and, in other cases, the hearing is before a single inquiry officer with no appeal beyond the Attorney General. The statute is specific on the point that its provisions on hearings are exclusive and, thus, not to be confused with those in the Administrative Procedure Act.¹²⁵ But what of the alien who is already a resident of this country and to whom "due process" clearly applies? Although the new law and current regulations are more detailed on the procedure to be used, the Attorney General is given unlimited discretion on the question of bail and his decision to deport is final with no further statutory appeal.¹²⁶

Recent decisions of the Supreme Court in this area deal primarily with the interpretation of the procedural provisions of the 1952 statute and related laws, or with their constitutionality under due process. As a generalization, the Court has always said that since Congress can exclude all aliens it can impose conditions to admission, including procedural ones, and that judicial review is not a requirement.¹²⁷ At the same time it must be remembered that through habeas corpus the courts have always granted a limited protection to aliens. The use of habeas corpus, and the insistence that some aliens because of their particular status may receive more protection than others, is well brought out in the recent case of *Kwong Hai Chew v. Colding*.¹²⁸ The petitioner here was a Chinese seaman, permanently residing in the United States, who on return from a voyage on a vessel of American registry was ordered excluded without a hearing, the Attorney General having determined that the order was based on confidential informa-

¹²² *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953).

¹²³ 66 Stat. 185 (1952), 8 U.S.C.A. § 1182 (1953).

¹²⁴ 66 Stat. 206 (1952), 8 U.S.C.A. § 1251(a)(7) (1953).

¹²⁵ *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950) had held otherwise.

¹²⁶ 66 Stat. 208 (1952), 8 U.S.C.A. § 1252(a) (1953).

¹²⁷ For an alien on the threshold of this country Congress determines due process. *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950).

¹²⁸ 344 U.S. 590 (1953).

tion. Differentiating *Knauff v. Shaughnessy*,¹²⁰ which had held that a nonresident alien had no necessary right to be heard, the Supreme Court emphasized that this alien was only temporarily absent from the country, that such resident aliens have a right to due process and that the statutory provision denying a hearing should be interpreted not to include this type of alien.¹²⁰ With less unanimity the Supreme Court decided in *Heikkila v. Barber*¹²¹ that, under the 1950 statute, an order deporting a resident alien on the ground of Communist party membership could not be attacked except by habeas corpus and that this denial of ordinary review was not lack of due process in an area primarily political. For Justices Frankfurter and Black, the declaratory judgment¹²² procedure of the Administrative Procedure Act of 1946 was applicable. The degree to which the more limited appeal through the "Great Writ," confining itself to questions of due process, could approach review of the record was not discussed in detail by the Court.

When these cases are compared with a third 1953 case it is clear that an issue of great importance is the definition of *resident* alien. In *Shaughnessy v. United States ex rel. Mezei*¹²³ a bare vote of five to four placed the petitioner in the category of the *Knauff* case, a non-resident who could be held for deportation without a hearing in view of the assertion of the Attorney General that the basis for the order was confidential. Mezei differed from Kwong Hai Chew in that although previously a resident, his absence from the country was more than temporary. After living in the United States from 1923 to 1948, he left to visit his dying mother in Rumania. Delayed by difficulties in obtaining exit permits, he again reached the United States in 1950, only to be denied admission. For over a year he made fruitless efforts to obtain admission to other countries and finally applied for habeas corpus for release from Ellis Island. When the Government declined to divulge the secret information to the district court *in camera*, the latter finally directed release on parole. In reversing this, the majority held that it is not illegal to continue to confine this "nonresident" alien

¹²⁰ 338 U.S. 537 (1950).

¹²⁰ The two lower courts felt bound by the *Knauff* decision. For decision of the district court see 97 F.Supp. 592 (E.D.N.Y. 1951) and for court of appeals see 192 F.2d 1009 (2d Cir. 1951). The Supreme Court, in avoiding the constitutional issue, was deciding that under the regulations then applicable (8 Code Fed. Regs. § 175.57[b] [1949], superseded by 66 Stat. 182 [1952], 8 U.S.C.A. § 1182 [1953]), on *exclusion* this type of *resident* alien was not referred to. Mr. Justice Minton dissented without opinion.

¹²¹ 345 U.S. 229 (1953). The majority is following the historical view that habeas corpus is the only remedy and does not find that the Administrative Procedure Act specifically changed it.

¹²² The Administrative Procedure Act "should be treated as a far-reaching remedial measure." Mr. Justice Frankfurter, 345 U.S. 229, 238 (1953).

¹²³ 345 U.S. 229, 237 (1953).

on Ellis Island without a hearing. The cogent reply of Justices Black, Douglas, Jackson and Frankfurter is that this alien in his circumstances, where confinement is no longer ancillary to exclusion, must have a hearing in order to comply with due process.¹³⁴

Only brief mention can be made of other cases in this currently important area. Mr. Justice Douglas granted bail in *Yanish v. Barber*,¹³⁵ after it had been refused an alien by the Attorney General, thus interpreting the Nationality Act to allow judicial review of this discretionary act. Through a slim margin of four to three, the Supreme Court reversed the conviction of Harry Bridges for knowingly making a false statement under oath in a naturalization proceeding, thus ending one of the indirect attempts to denaturalize and deport him.¹³⁶ The basis of the decision was that the statute of limitations had run. Other decisions by the Supreme Court included one on loss of citizenship through residence abroad¹³⁷ and another involving a conspiracy to obtain illegal entry of aliens through temporary marriages.¹³⁸ In the lower federal courts, decisions on denaturalization, deportation, acquisition of citizenship through a parent, expatriation and the statutory requirements for naturalization have been too numerous to discuss in detail.¹³⁹ Suffice it to predict that some concerning due process will be the subject of later decisions by the Supreme Court.

III

LOCAL RESTRAINTS ON FREEDOM OF SPEECH

A few years ago the central controversy in this field was whether the states and municipalities, in the interest of law and order, could

¹³⁴ The attitude of the dissent is well brought out in Mr. Justice Jackson's opinion where he refers to the *Knauff* decision as a "near mess, saved by further administrative and congressional hearings from perpetrating an injustice." 345 U.S. 206, 225 (1953). It is interesting to note that Mezel has finally been granted a hearing. *N.Y. Times*, Dec. 10, 1953, p. 62, col. 6.

¹³⁵ 73 Sup. Ct. 1105 (1953).

¹³⁶ *Bridges v. United States*, 346 U.S. 209 (1953).

¹³⁷ *Mandoli v. Acheson*, 344 U.S. 133 (1952).

¹³⁸ *Lutwak v. United States*, 344 U.S. 604 (1953).

¹³⁹ E.g., *Coons v. Boyd*, 203 F.2d 804 (9th Cir. 1953) (no denial of due process in deportation hearing where alien waived representation by counsel); *Barber v. Varleta*, 199 F.2d 419 (9th Cir. 1952) (no authority to deport); *United States ex rel. Nukk v. District Director of Immigration and Naturalization*, 205 F.2d 242 (2d Cir. 1953) (discretion of Attorney General in withholding bail not unlawful); *United States ex rel. Hyndman v. Holton*, 205 F.2d 228 (7th Cir. 1953) (no abuse of discretion in denying bail).

Others have been on more traditional questions. E.g., *Okimura v. Acheson*, 111 F.Supp. 303 (D. Hawaii, 1953) (loss of citizenship by serving in another army); *Ly Shew v. Acheson*, 110 F.Supp. 50 (N.D. Cal. 1953) (claim of citizenship by birth); *Longobardi v. Dulles*, 204 F.2d 407 (D.C. Cir. 1953) (expatriation).

prevent such individuals as Father Terminiello¹⁴⁰ or Feiner,¹⁴¹ the Syracuse student, from addressing crowds, or whether in the interest of protecting against "aural aggression" sound amplification devices could be regulated.¹⁴² Although cases continue to mark the boundary in this area between local control and free speech, the focus of attention has been on the power of censorship. In addition, questions have arisen on taxes on newspapers, the right of the press to attend a morals trial and the regulation of lobbying. Most important cases on permits to speak in public places have more directly concerned the freedom of religion.

At least five important cases in the states are related to last year's *Burstyn v. Wilson*¹⁴³ in which the Supreme Court of the United States held unconstitutional the New York censorship of the motion picture, "The Miracle." To refuse a license, said the Court, on the vague basis that the film is "sacrilegious" effects an illegal prior restraint on the freedom of expression. Since the decision for the first time brought motion pictures within the protections of the First and Fourteenth Amendments, it is natural that progeny appeared in 1953. In the two most important of these cases, the highest courts of New York and Ohio were able to differentiate the facts involved and to uphold the administrative refusals to license. *Commercial Pictures v. Board of Regents of University of State of New York*¹⁴⁴ affirmed by four to two the decisions of the Motion Picture Division of the State Education Department and of the Regents, both of which had denied a license for the exhibition of "La Ronde" on the basis that it was "immoral" and "would tend to corrupt morals" within the meaning of the statutes. Portrayed in the movie were ten episodes dealing with promiscuity, adultery, fornication and seduction, with the narrator reminding the audience at the end that "it is the story of everyone." As the Court of Appeals pointed out, the protection against prior censorship, although fundamental, is not absolute. The Supreme Court has upheld prior censorship of that which is manifestly lewd, obscene or profane, just as it has also allowed municipalities to prevent "fighting words" which tend toward an imminent breach of the peace.¹⁴⁵ Nor did the Court of Appeals feel that the term "immoral" was vague and abstract

¹⁴⁰ Terminiello v. Chicago, 337 U.S. 1 (1949).

¹⁴¹ Feiner v. New York, 340 U.S. 315 (1951).

¹⁴² Kovacs v. Cooper, 336 U.S. 77 (1949). See Abernathy, Assemblies in Public Streets, 5 So. Car. L.Q. 384 (1953).

¹⁴³ Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952). For recent Case Comments see 25 Rocky Mt. L. Rev. 253 (1953); 6 U. of Fla. L. Rev. 131 (1953).

¹⁴⁴ 305 N.Y. 336, 113 N.E.2d 502, probable juris. noted, 74 Sup. Ct. 104 (1953). See 38 A.B.A.J. 771 (1952) for comment on lower court decision.

¹⁴⁵ The basic doctrine against prior censorship proceeds from Near v. Minnesota, 283 U.S. 697 (1931). The "fighting words" doctrine is also known as the Chaplinsky doctrine. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

when it so clearly refers to "sexual immorality," nor that any doubt could exist on the immorality of a film which depicts promiscuity as normal. No quarrel is made on these constitutional principles by the dissenters, Judges Dye and Fuld. But how can the exhibition of "La Ronde" present any "clear and present danger" of evil when it has apparently not done so in many other states in the Union? Can it be said that the term "immoral"—to be differentiated from "obscene"—is any more concrete than "sacrilegious"? Which way such a case will be disposed of by the Supreme Court of the United States will depend on which major premise predominates. Prior restraint of free speech, whether by law or by the opportunity of excessive administrative discretion, has been traditionally viewed as "an infringement upon freedom of expression to be especially condemned." The exceptions, as in the *Chaplinsky* doctrine or obscenity cases, have been narrowly defined. Is there a clear and present danger of evil when most states find none, when reasonable men seem to differ and when some can say:

For all the intimacy of its nuances, the film's approach is dryly detached and completely charming; it spoofs sex rather than exploits it. . . . Here is a lovely motion picture, a gay, a glad, a sad, a sentimental movie . . . delicately done and in excellent taste.¹⁴⁶

Much reliance is placed on this differentiation by the New York court between the *Burstyn* and *Commercial Pictures* cases in the Ohio decision, *Superior Films v. Department of Education*,¹⁴⁷ which concerned three cases raising the same issues. Granting the expressions of the Supreme Court on prior censorship and on vague standards, the Ohio court found "a limited field in which decency and morals may be protected" by proper criteria. The case differs considerably from those in New York because the motion picture, "M," portrayed a series of brutal crimes by a schizophrenic child killer "which could lead to a serious increase in immorality and crimes." Certainly the addition of these recent cases should underscore the fact that the issue of federalism must be considered along with those of police power and free speech. In the *Burstyn* case, as well as both recent decisions, the state courts have held for censorship and have reminded that criminal prosecution after the fact is often ineffective. To what degree should the United States Supreme Court in effect establish one set of mores and standards for the entire country?

Of other related decisions worthy of note, the New Jersey Supreme Court held in *Adams Theatre Co. v. Keenan*¹⁴⁸ that the denial of a license on the ground that indecent burlesque shows would be

¹⁴⁶ 305 N.Y. 336, 339, 113 N.E.2d 502, 514 (1953) (Dye, J. dissenting, quoting from motion picture reviews).

¹⁴⁷ 159 Ohio St. 315, 112 N.E.2d 311 (1953).

¹⁴⁸ 12 N.J. 267, 96 A.2d 519 (1953).

offered the public was illegal because of lack of proof. Again, the superior court of the same state found in *Bantam Books, Inc. v. Melko*¹⁴⁹ that the prosecutor of the pleas had no authority to direct withdrawal of the book, *The Chinese Room*, from circulation and that his action was, therefore, unconstitutional as a prior restraint on freedom of the press.

The right of freedom of speech and press was also asserted in cases not involving censorship. In connection with the well-publicized Minot Jelke trial on a morals charge, the New York Supreme Court upheld trial Judge Valente's order excluding the press from the courtroom, solely on the ground that the statutes gave the judge the power where testimony on sodomy was introduced.¹⁵⁰ According to the Supreme Court of Florida, a statute making it unlawful to transmit the result of a horse race from the track within thirty minutes after posting is a reasonable exercise of police power.¹⁵¹ The right to petition Congress was upheld in a District of Columbia case invalidating a section of the Federal Lobbying Act.¹⁵² Upholding a nondiscriminatory business-license tax, a California court declared it applicable to the publication of a newspaper.¹⁵³

IV

FREEDOM OF RELIGION

Jehovah's Witnesses are with us once again as a vehicle for two decisions by the Supreme Court in the area of religious freedom. In recent years the important issue has been that of state aid to religion, as in *Zorach v. Clauson*¹⁵⁴ in 1952. Here, the complainant may be the taxpayer who does not wish money spent even indirectly for religious purposes, or the unbeliever who feels coerced by an official recognition of religion. But behind these decisions, as for example those on released time, lies the thought that some kind of separation must exist between Church and State because aid to religion may become interference with religion. It is in this more traditional area of interference

¹⁴⁹ 25 N.J. Super. 292, 96 A.2d 47 (Ch. Div. 1953).

¹⁵⁰ *United Press Ass'ns v. Valente*, Judge, 203 Misc. 220, 120 N.Y.S.2d 642 (Sup. Ct.), aff'd, 281 App. Div. 395, 120 N.Y.S.2d 174 (1st Dep't 1953). This case for an order of prohibition by the newspaper publishers must be differentiated from Jelke's contention that he did not have a public trial.

¹⁵¹ *State v. Ucciferri*, 61 So.2d 374 (Fla. 1952).

¹⁵² *United States v. Harris*, 109 F.Supp. 641 (D.D.C. 1953).

¹⁵³ *City of Corona v. Corona Daily Independent*, 115 Cal. App.2d 382, 252 P.2d 56 (1953).

¹⁵⁴ 343 U.S. 306 (1952). This released-time program was differentiated from an earlier one in *McCollum v. Board of Education*, 333 U.S. 203 (1948). See Bischoff, *Minority Rights and Majority Rule*, 39 Va. L. Rev. 607 (1953); Boyer, *Religious Education of Public School Pupils in Wisconsin*, [1953] Wis. L. Rev. 181; Katz, *Freedom of Religion and State Neutrality*, 20 U. of Chi. L. Rev. 426 (1953).

with the exercise of religion, particularly by a minority group, that the Witnesses have usually been involved.

The two decisions this year bear not only on this question of state interference with religious worship but also on the allied question of the power of a municipality to restrict free speech in the interest of public peace and welfare. In *Fowler v. Rhode Island*¹⁵⁵ the Court unanimously reversed the Rhode Island courts which had upheld a Pawtucket ordinance against addressing "any political or religious meeting in any public park." Uncontradicted testimony showed that the defendant had addressed a gathering of about 400, with the aid of two microphones, on the subject "The Pathway To Peace" and had emphasized that the Scriptures showed "we were on the string of time." Where the Supreme Court of Rhode Island upheld the conviction, stressing the public interest in rest and recreation, the Supreme Court of the United States pointed out that Catholics and Protestants were allowed to conduct religious services, including sermons, in the park. To forbid an "address" to a minority group and permit "sermons" to more orthodox religions was preferring one group over another. Although the statute, therefore, in terms allowed no discretion in the usual permit sense, the result was the same. Whether *all* sermons and addresses may be forbidden in a public park in the interest of the rights of recreation and meditation remains unanswered.

To the second case, *Poulos v. New Hampshire*,¹⁵⁶ there will be violent reactions, just as there was also sharp difference of opinion within the Supreme Court. In contradistinction to the Pawtucket ordinance, a New Hampshire statute, and a permissive Portsmouth ordinance enacted thereunder, required a license before speaking in one small park in the city. The defendant, a member of Jehovah's Witnesses, was convicted of violating the law because he insisted on speaking after being refused a license. Affirming the conviction, the Supreme Court of New Hampshire held that since the ordinance allowed no unreasonable discretion in the grant of permits it was valid on its face, that the withholding of the license was arbitrary but that this could not be used as a defense to a criminal action. Under New Hampshire procedure where a statute is valid the remedy for its arbitrary application is by certiorari. The validity of this procedural requirement was, therefore, the chief issue before the United States Supreme Court. May an individual defy the illegal administration of a valid licensing law concerning the exercise of free speech or may the state force him to use remedies like certiorari or mandamus in lieu of violation of the law? Under due process, is it sufficient protection for a speaker that he has such orderly remedies, or in the interest of

¹⁵⁵ 345 U.S. 67 (1953).

¹⁵⁶ 345 U.S. 395 (1953).

speech at this time must he be allowed to violate the administrative action and defend on the basis of arbitrariness? Seven members of the Court, speaking through Mr. Justice Reed, agreed that it is not unconstitutional for the state to require the more orderly remedies, although Mr. Justice Frankfurter emphasized in a concurring opinion that no showing had been made that this remedy was not prompt and effective. For Mr. Justice Black and Mr. Justice Douglas, however, the result is the equivalent of prior censorship. If the legislature cannot censor in advance, how can administrative officials in combination with judicial procedure?

The *Poulos* decision exemplifies the great variety of ways in which the state legislatures and state courts can attack one problem. To what degree may the states regulate speeches in public places? One familiar method has been to require permits. If too much discretion is allowed an administrator, as in *Saia v. New York*,¹⁵⁷ the statute or ordinance is unconstitutional. If no discretionary permits are allowed, the statute may still be enforced illegally, as in *Fowler v. Rhode Island*; or, as in the *Poulos* case, the illegal use of discretion by the administrator combined with the refusal to allow a violation may effectively ban a speaker. Yet, it must be remembered that the argument is far from one-sided. Discretion is involved in the enforcement of all statutes, no matter how concretely they may be phrased, and the effect may be similar to prior censorship. The point is well illustrated by Mr. Justice Black's argument in *Feiner v. New York*¹⁵⁸ that an illegal arrest of a speaker on a charge of disorderly conduct effectively restrains the speaker. Where, finally, a statute absolutely prohibits speech, little law is to be found and the decisions are far from clear-cut.

Quite aside from the above cases on interference with religion, numerous disputes in the area of state aid to religion indicate that the *Everson-McCollum-Zorach* doctrine needs further elucidation. Several cases raise the *Everson* problem of public transportation to parochial schools. Asserting in that decision that a high and impregnable wall is established by the Constitution between Church and State, the Supreme Court nevertheless held that the reimbursement to parents for fares paid in transporting children via public bus lines to parochial schools was not such a benefit to Catholicism that it could be held a breach in the wall. By implication this would mean that the use of regular school buses under a statute authorizing such would not be unconstitutional. But what if a statute does not provide for such transportation or the authorities refuse? The Cranston, Rhode Island, School Committee by a five-to-four vote refused recently to provide transportation to parochial schools where a law of the state

¹⁵⁷ 334 U.S. 558 (1948).

¹⁵⁸ 340 U.S. 315 (1951).

legislature apparently makes it mandatory.¹⁵⁹ In *McVey v. Hawkins*¹⁶⁰ a school board authorized such transportation, but this action was held unconstitutional under a state constitutional requirement that public school moneys may be used only to maintain free public schools. It is submitted that such a provision is not federally unconstitutional, in that the Supreme Court will probably declare when the occasion arises that the issue is one within the discretion of legislatures and school boards. In the same general Church-State field, various skirmishes have been reported because of the distribution of Bibles in schools or the reading of the Bible.¹⁶¹

Many of the questioned interferences with religion have involved the application of well-established principles of law. Thus, Sunday-closing laws were held validly applied in several cases,¹⁶² and certain religious properties not used exclusively for that purpose were held not tax exempt.¹⁶³ Where a state declared a child a state ward so as to administer a blood transfusion, permission for which was refused by the father on religious grounds, the action was upheld.¹⁶⁴ The usual questions have also arisen on the classification of conscientious objectors under the Selective Service Act. Two Supreme Court cases, *United States v. Nugent* and *United States v. Packer*, held it was not lack of due process to withhold an FBI report on an individual who claimed he should be classified as a conscientious objector.¹⁶⁵

V

DISCRIMINATION

Introduction.—The last decade and more has witnessed significant progress in translating into reality the constitutional prohibition against any governmental discrimination because of color, race or religion. With a more receptive and enlightened public opinion, both the legislatures and the courts have aided in making day-by-day work-

¹⁵⁹ American Jewish Committee and Anti-Defamation League of B'nai B'rith, Joint Memorandum (Feb. 20, 1953).

¹⁶⁰ 258 S.W.2d 927 (Mo. 1953). American Jewish Committee and Anti-Defamation League of B'nai B'rith, Joint Memorandum (June 20, 1953).

¹⁶¹ The basic decision in 1952 was *Doremus v. Board of Education*, 342 U.S. 429 (1952). See also American Jewish Committee and Anti-Defamation League of B'nai B'rith, Joint Memoranda (Dec. 9, 1952; April 21, 1953).

¹⁶² *Lane v. McFadyen*, 66 So.2d 83 (Ala. 1953); *Reynolds v. McFadyen*, 66 So.2d 89 (Ala. 1953); *Henderson v. Antonacci*, 62 So.2d 5 (Fla. 1952). See Note, 5 Ala. L. Rev. 349 (1953).

¹⁶³ *Defenders of the Christian Faith v. Horn*, 174 Kan. 40, 254 P.2d 830 (1953); *Board of Christian Education v. School District*, 171 Pa. Super. 610, 91 A.2d 372 (1952).

¹⁶⁴ *Morrison v. State*, 252 S.W.2d 97 (Mo. Kansas City Ct. App. 1952).

¹⁶⁵ 346 U.S. 1 (1953). For more typical examples see *United States v. Hein*, 112 F.Supp. 71 (N.D. Ill. 1953); *Petition of Jost*, 256 P.2d 71 (Cal. App. 1953). See Sibley & Jacob, *Conscription and Conscience, the American State and the Conscientious Objector*, 1940-1947 (1952).

ing rules out of constitutional platitudes. Because of great emphasis on constitutional decisions, particularly against all-white primaries or juries, unequal educational facilities, and racial restrictive covenants, there has been a tendency to forget the role of the legislature. Not only have general civil rights statutes been "revived"¹⁶⁶ but many antidiscrimination laws covering the specific fields of education, housing, employment and public accommodations have either reinforced the constitutional proscription of discrimination by government or outlawed discrimination by private individuals and companies.¹⁶⁷

Jury Service.—So many Supreme Court decisions have recently underscored the constitutional principle that discrimination against Negroes on jury service is illegal, that it is surprising to find in 1953 two cases decided by that Court and several decisions by highest state tribunals. Undoubtedly this reflects the fact that some regions of the South still defy the Constitution and that many administrators remain unenlightened. While in *Avery v. Georgia*¹⁶⁸ the Supreme Court reversed a state conviction of a Negro for rape because of prima facie discrimination, it affirmed in *Brown v. Allen*¹⁶⁹ the refusal of lower federal courts to issue writs of habeas corpus to Negroes who complained of discrimination in jury selection. Undisputed in the *Avery* case was the fact that jury drawings were made from a box containing the names of potential white jurors on white slips and Negro jurors on yellow slips, and also that no Negro was selected. Although the practice had no authorization in Georgia statutes and the Supreme Court of Georgia found it prima facie evidence of discrimination, it had affirmed the conviction because the accused had failed to prove any particular act of discrimination. As the Supreme Court of the United States points out, it is the state which must fill the "vacuum." The Court has for many years implemented the constitutional principle with a presumption that the lack of any Negro juror over the years is prima facie evidence of discrimination.¹⁷⁰

¹⁶⁶ Cases involving general civil rights statutes include: *Brown v. United States*, 204 F.2d 247 (6th Cir. 1953); *Whiting v. Seyfridt*, 203 F.2d 773 (7th Cir. 1953); *Kilgore v. McNethan*, 205 F.2d 425 (5th Cir. 1953). See also Note, 66 Harv. L. Rev. 1285 (1953).

Several cases involved the attempt to extend the applicability of the Federal Civil Rights Act to judges who had allegedly violated it. See, e.g., *Francis v. Crafts*, 203 F.2d 809 (1st Cir. 1953). See 39 A.B.A.J. 595 (1953).

¹⁶⁷ See Poole, *Statutory Remedies for the Protection of Civil Rights*, 32 Ore. L. Rev. 210 (1953). Excellent summaries of recent developments on the statutory protection against discrimination in employment and public accommodations are in American Jewish Committee and Anti-Defamation League of B'nai B'rith, *Joint Memoranda* (Feb. 24, 1953; July 10, 1953). Also see comment on Civil Rights in State Legislatures, 3 NAIRO Rep. (1953).

¹⁶⁸ 345 U.S. 559 (1953).

¹⁶⁹ 344 U.S. 443 (1953).

¹⁷⁰ *Norris v. Alabama*, 294 U.S. 587 (1935); *Hill v. Texas*, 316 U.S. 400 (1942); *Patton v. Mississippi*, 332 U.S. 463 (1947).

Brown v. Allen, and two companion cases also from North Carolina, raised the question of how far the Supreme Court will go in banning possible discrimination by indirect means. The decision is complicated, however, by a dispute within the Court on a procedural ground. After a previous opinion of the Supreme Court¹⁷¹ had reversed a conviction in the same county because of discrimination in jury selection, the system was changed to one whereby a list of names was compiled from a tabulation of all the county property and poll taxpayers. Although Negroes in the county constituted about 33 per cent of the population, they made up only 16 per cent of the listed taxpayers. After public drawings by a child, between 7 and 10 per cent of those drawn for grand jury panels and between 9 and 17 per cent of the persons drawn for petit jury panels were Negroes. Holding that the state had met any presumption of discrimination and that there was no additional proof of such, the majority emphasized that short of a denial of due process a federal court cannot impose its conceptions of criminal procedure on a state. To this Mr. Justice Black and Mr. Justice Douglas in dissent answered that the statistics showed only a partial abandonment of old discriminatory practices and that the "tax list technique" should not be treated as a complete neutralizer of racial discrimination.

Both the Supreme Court of Arkansas and the Supreme Court of South Carolina reversed convictions this past year because of discriminatory administration of the law. In *Green v. State*,¹⁷² an Arkansas case, although Negroes numbered one-third of the qualified electors, they had not been included on jury panels. The presumption of discrimination raised by this fact was not overcome, said the court, by the selection of Negroes on special panels used only after the regular panels were exhausted. *State v. Waitus*¹⁷³ showed the usual history of lack of Negroes on either grand or petit juries, even though they represented in the one case 10 per cent and in the other 25 per cent of the qualified electors. Evidence of no purposeful or intentional discrimination was held insufficient to rebut the presumption. Certainly both of these state decisions indicate that, with the aid of the presumption created by the Supreme Court of the United States, highest state courts even in the South will protect Negroes against discriminatory administrative practices. To what degree tax lists and other such bases which do not accurately reflect actual population can be used will depend on the particular device and the consideration which fed-

¹⁷¹ *Brunson v. North Carolina*, 333 U.S. 851 (1946).

¹⁷² 258 S.W.2d 56 (Ark. 1953).

¹⁷³ 77 S.E.2d 256 (S.C. 1953). See Notes, 51 Mich. L. Rev. 925 (1953), 39 Va. L. Rev. 373 (1953).

eral courts give to the contention that they are unreasonably interfering with state criminal procedure.

Housing.—Since *Shelley v. Kraemer*¹⁷⁴ it has been contrary to the Fourteenth Amendment for a state equity court to enforce a restrictive covenant agreement against a Negro purchaser. Such enforcement constitutes state action denying equal protection of the laws to Negroes. Differences of opinion soon rose among the state courts¹⁷⁵ as to whether a party to such a covenant could, through court action, collect damages for violation from another party to the agreement who sold or rented to a Negro. Contributing to the doubt was the opinion in the *Shelley* case itself because it indicated that the agreement was not *per se* illegal so long as "effectuated by voluntary adherence."

The Supreme Court in *Barrows v. Jackson*¹⁷⁶ has now ruled that a court may not award damages for breach of a racial restrictive covenant, again on the theory that it is forbidden state action. To compel the party who has violated to pay damages would usually result in indirect enforcement by the state rather than through voluntary action of the parties. In a dissenting opinion, the late Chief Justice Vinson pointed out that "the Court, by a unique species of argument, has developed a unique exception to an otherwise easily understood doctrine."¹⁷⁷ This difference of opinion is caused by an apparent conflict between two principles followed by the Supreme Court: to enforce such covenants by any form of court action is state action; a party to a case, however, cannot ordinarily vindicate the rights of third persons. For Chief Justice Vinson there was no non-Caucasian before the Court whose rights are at all interfered with and hence there is no jurisdiction in the Court to decide any question on the merits. To relieve herself of the responsibilities of her own covenant, the defendant in the action is appointing herself agent of prospective non-Caucasian vendees. In reply, the majority emphasize that this

¹⁷⁴ 334 U.S. 1 (1948).

¹⁷⁵ *Welsh v. Leason*, 359 Mo. 1054, 225 S.W.2d 127 (1949) (damage allowed); *Correll v. Early*, 205 Okla. 366, 237 P.2d 1017 (1951) (damages allowed); *Phillips v. Naff*, 332 Mich. 389, 52 N.W.2d 158 (1952) (not allowed); *Robert v. Curtis*, 93 F.Supp. 604 (D.D.C. 1950) (not allowed). See Notes, 30 Chi-Kent Rev. 350 (1952), 66 Harv. L. Rev. 353 (1952), 6 Loyola L. Rev. 154 (1952); 26 So. Calif. L. Rev. 201 (1953), 22 U. of Cin. L. Rev. 97 (1953). For other aspects see particularly American Jewish Committee and Anti-Defamation League of B'nai B'rith, Joint Memorandum (April 16, 1953).

¹⁷⁶ 346 U.S. 249 (1953). The lower court here followed the rule of no damages. Plaintiff in the case argued that to refuse damages was taking his property without due process, since the agreement is not *per se* illegal, and that the defendant had no standing. See Notes, 17 Albany L. Rev. 186 (1953), 38 Cornell L.Q. 236 (1953), 4 Hastings L.J. 57 (1952), 37 Minn. L. Rev. 65 (1952).

¹⁷⁷ 346 U.S. 249, 260 (1953).

salutary rule is one of practice, the underlying reasons for which are outweighed by the desirability of protecting fundamental rights. Although the Chief Justice has much precedent in his favor,¹⁷⁸ is it not essentially an artificial argument, particularly since it is difficult to see how a Negro could become a party in interest in a damage suit of the type of *Barrows v. Jackson*.

Aside from this question of the enforcement of private restrictive covenants, other legal issues in the housing field arise because of discrimination by municipalities or other governmental agencies in public housing. As is evident from a casual reading of newspapers, public opinion in some northern and southern areas of the country is not yet completely against segregation.¹⁷⁹

Education.—"Because of the national importance of the issue presented"—so begins the phrase in a *per curiam* opinion asking for oral argument in one of the current school segregation cases.¹⁸⁰ Is segregation in public schools *per se* unconstitutional? A year has passed since the Court first held hearings on the series of cases which raise one of the most fundamental issues ever faced by the highest Court. Possibly by the time this is read the result will be known. Because of the imminence of some decision on the question and the rather detailed analysis of the cases to be found in the last *Annual Survey*, I will only briefly summarize the situation as it appears today. In the realm of higher education, particularly professional schools and other graduate schools, the Supreme Court three years ago in *Sweatt v. Painter*¹⁸¹ and *McLaurin v. Oklahoma*¹⁸² held that segregated education was not and could not be equal. Since the Court emphasized that this level of education required a dynamic interchange of ideas, it was declaring no absolute applicable to all levels of education. Meanwhile, many of the increasing attacks and decisions on segregation at lower levels of education were made primarily on the basis that facilities for Negro pupils were not equal to those available to white. The uniqueness of *Briggs v. Elliott*¹⁸³ and the other cases

¹⁷⁸ A good example is *Tilston v. Ullman*, 318 U.S. 44 (1943), where a doctor could not assert the right of his patient to contraceptive advice.

¹⁷⁹ See particularly American Jewish Committee and Anti-Defamation League of B'nai B'rith, *Joint Memoranda* (Nov. 6, 1952; Jan. 12, 1953; March 20, 1953; April 20, 1953; June 18, 1953; July 16, 1953; July 24, 1953; July 28, 1953).

¹⁸⁰ *Brown v. Board of Education*, 344 U.S. 141, 142 (1952). Since a thorough discussion of the cases and issues can be found in 1952 *Annual Surv. Am. L.* 99-103, 28 N.Y.U.L. Rev. 97-101 (1953), little additional comment is necessary until the Court's actual decision is announced.

¹⁸¹ 339 U.S. 629 (1950).

¹⁸² 339 U.S. 637 (1950).

¹⁸³ 98 F.Supp. 529 (E.D.S.C. 1951), judgment vacated and remanded to district court, 342 U.S. 350 (1952).

now before the Court lies in the fact that they offer an easier opportunity than previously for the justices to declare segregation in public schools *per se* unconstitutional.

Meanwhile the argument proceeds, particularly on three questions. Within the spirit of the *McLaurin* case, can it be proved that segregation at lower levels of education has a deleterious effect on Negroes? With reference to control and regulation of the varying mores and customs of different regions in our country, what is the function of the judiciary compared with that of the legislature? What will be the effect of a Supreme Court decision outlawing segregation in education? For anyone who believes that our public school system has been a great force in creating an enlightened public opinion out of the diverse elements in our population, the answer to the first question is clearly in the affirmative. As for the function of the judiciary in removing a blemish which is fundamentally "unconstitutional" but which is intricately woven into the mores of many regions in the United States, my answer is that the Courts can join with many other enlightened forces in society in leading the way. Granted that they cannot impose that which is intolerable to a majority of public opinion, enough leadership even in the South is receptive and enough preparatory steps have already taken place so that the decision will not be revolutionary. The Supreme Court does not have to reflect majority opinion. History shows that it has often led the way and also sometimes lagged far behind. In my opinion few riots will result from an antisegregation decision. To be sure, the Talmadge-type state governors may for a time be able to secure a political advantage, and a generation in the South may try to sabotage through an emphasis on private schools. As with the history of discrimination in elections and primaries, courts will be faced with indirect *state* discrimination and the realities of life may diminish for a time a true equal opportunity—but in the long run the die is cast. The following quotation from *Carr v. Corning* is not inappropriate:

It is sometimes suggested that due process of law cannot require what law cannot enforce. No such suggestion is relevant here. When United States courts order integration of District of Columbia schools they will be integrated. It has been too long forgotten that the District of Columbia is not a provincial community but the cosmopolitan capital of a nation that professes democracy.¹⁸⁴

Judging by the general lack of lower court decisions and of new legislation in this field, both the judiciary and the state legislatures are marking time. A few recent lower court decisions have relied on the

¹⁸⁴ 182 F.2d 14, 33 (D.C. Cir. 1950).

existence of unequal educational facilities;¹⁸⁵ some legislation has been proposed but without significant result.¹⁸⁶ For example, in California a fair education practice bill died in committee, as was true also in Missouri and Connecticut. Implementation was given to New York's comprehensive law through a bill signed by the governor making it an unfair educational practice for institutions of higher education to accept any endowment or gift conditioned on the teaching of any doctrine of racial superiority.¹⁸⁷

Elections.—Although the ideal is far from established, the South has made great advances in giving the Negro his right to vote. For it must not be forgotten that it was first in 1915 that the "Grandfather Clauses" were declared illegal, only slightly more than a generation ago.¹⁸⁸ Just twenty-one years ago, in *Nixon v. Condon*,¹⁸⁹ the Supreme Court declared that the action of the Democratic party in preventing Negroes from participating in the primary was state action because the power was delegated by the state. In spite of the very recent *Smith v. Allwright*¹⁹⁰ and *Rice v. Elmore*¹⁹¹ decisions, which held that the state could not disassociate itself from the regular party primaries, some attempts are still made to prolong the fiction that party action is not state action. A late example of this is found in the current Supreme Court case of *Terry v. Adams*.¹⁹²

The *Terry* decision declared unconstitutional the acts of a "caucus within a caucus" and the fact that four opinions by members of the Court were necessary would seem to indicate that Texas came close to disassociating itself from the discriminatory practices involved. Several months before primary elections, the members of the Jaybird Democratic Association held a meeting and nominated for county offices. Membership was restricted to whites and the nominees then entered the Democratic primaries where they were always successful.

¹⁸⁵ *Wichita Falls Junior College Dist. v. Battle*, 204 F.2d 632 (5th Cir. 1953). See also *Chestang v. Burns*, 64 So.2d 65 (Ala. 1953).

¹⁸⁶ The Arizona situation is interesting. In 1951 the legislature repealed the laws requiring segregation in primary schools and permitting it in secondary schools. But local school boards were permitted to segregate. An Arizona lower court recently held the Phoenix School Board laws unconstitutional but on the basis of illegal delegation. American Jewish Committee and Anti-Defamation League of B'nai B'rith, Joint Memorandum (March 17, 1953).

¹⁸⁷ American Jewish Committee and Anti-Defamation League of B'nai B'rith, Joint Memorandum (July 10, 1953). For an analysis of the situation in New York medical schools, see *id.* (July 13, 1953).

¹⁸⁸ *Guinn v. United States*, 238 U.S. 347 (1915).

¹⁸⁹ 286 U.S. 73 (1932).

¹⁹⁰ 321 U.S. 649 (1944).

¹⁹¹ 165 F.2d 387 (4th Cir. 1947), cert. denied, 333 U.S. 875 (1948).

¹⁹² 345 U.S. 461 (1953); see Notes, 26 Temp. L.Q. 188 (1952), 101 U. of Pa. L. Rev. 145 (1952).

Although this organization and caucus was in no sense run under state primary laws and preceded the primary by several months, the Court held that the discriminations were state acts. Certainly the Jaybirds controlled the primary and also the election. For Mr. Justice Black and two colleagues this control and discrimination are sufficient where tolerated by the state.

It violates the Fifteenth Amendment for a state, by such circumvention, to permit within its borders the use of any device that produces an equivalent of the prohibited election.¹⁹³

Mr. Justice Frankfurter is much more careful to point out that the acts of private caucuses are not necessarily state acts.¹⁹⁴ Although he refused to agree with the district court which had found the Jaybird Association to be a political party, he found state action here because the county election officials had "participated in and condoned" the continued discrimination. This was not "boss control" nor "a case of spontaneous efforts by citizens to influence votes." The third majority opinion by Mr. Justice Clark, with three justices concurring,¹⁹⁵ agreed with the district court that the association is a political party and within the principles of *Smith v. Allwright*. For Mr. Justice Minton¹⁹⁶ in dissent, Jaybird was not a political party, no election officials participated in the procedure, and mere toleration of the activities of a private caucus is not official action.

Aside from the *Terry* case a federal court of appeals also held against discriminatory election practices.¹⁹⁷ The Supreme Court of Florida in *Smith v. Ervin*¹⁹⁸ upheld a statute limiting political contributions when applied to the purchase of radio time on radio, against the attack that it violated freedom of speech and press. Such contributions had to be authorized by the campaign treasurer and recorded as a gift to the campaign. Other cases concerned the details of election procedure and machinery.¹⁹⁹

VI

BUSINESS AND LABOR

The Power of Congress to Regulate.—We have come to regard the power of Congress, at least in the area of federal-state relation-

¹⁹³ *Id.* at 469.

¹⁹⁴ *Id.* at 470.

¹⁹⁵ Justices Reed, Jackson, and the late Chief Justice Vinson. *Id.* at 477.

¹⁹⁶ *Id.* at 484.

¹⁹⁷ *Bryce v. Byrd*, 201 F.2d 664 (5th Cir. 1953).

¹⁹⁸ 64 So.2d 166 (Fla. 1953).

¹⁹⁹ *E.g.*, *Nelson v. Watkinson*, 260 S.W.2d 1 (Mo. 1953) (school reorganization election), *Application of Wene*, 26 N.J. Super. 363, 97 A.2d 748 (Law Div. 1953) (who can vote in a primary); *Thorne v. Jones*, 335 Mich. 658, 57 N.W.2d 40 (1953) (same candidate in two party primaries); *Yenter v. Baker*, 248 P.2d 311 (Colo. 1952) (constitutional amendment).

ships, as absolute. To put it another way, the Supreme Court has in the last two decades abdicated its function of review so that for all practical purposes it is Congress which determines the extent to which the national Government will regulate for the general welfare and to what degree the states may continue to function. Cases on federalism, therefore, concentrate primarily on the issue of congressional *intent*, except for those involving state police regulations or taxes which allegedly burden the free flow of interstate commerce.

That the issue of the *extent* of national power is, nevertheless, not purely historical is evident from the recent case of *United States v. Kahriger*²⁰⁰ which involved the constitutionality of the Federal Gambler's Occupational Tax Act.²⁰¹ By a six-to-three vote the Supreme Court held that the statute was not unconstitutional as an invasion of the police powers of the states under the guise of the taxing power. An information had been filed against Kahriger on the basis that he was in the business of accepting wagers and that he had failed to register under the statute and pay the required fifty-dollar occupational tax. Is this a tax or is it a penalty for engaging in an activity declared illegal by the states? For both majority and minority it was easy to answer the question through precedent because this is an "area of abstract ideas" in which there have been diverse decisions. Numerous federal taxes have had a regulatory effect and the issue becomes one of how much leeway will be given the taxing power. Where a tax is clearly regulatory in a field within the national power no problem arises.²⁰² But if the result of the tax is to regulate an activity normally within the area of state control is it to be invalidated because of that effect?

Many attempts have been made to classify the long line of Supreme Court decisions which answer this question but, as Mr. Justice Frankfurter states in the instant case, this would be to "rehash the familiar."²⁰³ Suffice it to point out that the Court has in many cases used the test that the statute did or did not bear its regulatory purpose on its face. Thus the majority differentiated the tax on wagering from the special excise tax of \$1,000, placed on persons who carried on a liquor business in violation of state law, which was invalidated in *United States v. Constantine*.²⁰⁴ No such invasion of state sover-

²⁰⁰ 345 U.S. 22 (1953). See Notes, 41 Geo. L.J. 556 (1953), 32 Neb. L. Rev. 103 (1952), 31 N.C.L. Rev. 467 (1953), 47 N.U.L. Rev. 705 (1952), 28 Notre Dame Law. 127 (1952), 26 So. Calif. L. Rev. 203 (1953), 39 Va. L. Rev. 530 (1953).

²⁰¹ 65 Stat. 529 (1951), 26 U.S.C. § 3285(b)(2) (Supp. 1952).

²⁰² Thus, *Veazie Bank v. Fenno*, 75 U.S. 533 (1869) upheld a tax of 10 per cent on state bank notes because Congress has the power to regulate currency.

²⁰³ *United States v. Kahriger*, 345 U.S. 22, 37 (1953).

²⁰⁴ 296 U.S. 287 (1935).

eighty over crime, said Mr. Justice Douglas, was patent in the wagering tax, even though the registration provisions required information as to all wagering activities.²⁰⁵ To state the differentiation made by the Court proves its technical character, a distinction which has validity, in my opinion, only if one starts with the major premise that "the remedy for excessive taxation is in the hands of Congress" and that "the constitutional restraints on taxing are few." Since it is difficult to find a formula which will not unduly impair the taxing power, perhaps the decision is proper because the states clearly have no objection to this particular invasion of sovereignty.

As already indicated, most of the cases on congressional power concern only the interpretation of a law and have no direct or indirect effect on the federal structure. The only immediate result of many cases restricting the coverage of national legislation is to create or acknowledge a vacuum which Congress can fill or not, as it desires. A recent example of this is the decision that Congress had no intention of including the business of baseball in the antitrust laws,²⁰⁶ and that any amendment of the law to cover baseball is up to Congress and not the courts. Since no particular state regulations of baseball exist, the case has no practical effect on the federal-state question. Thus it is to be differentiated from a case like *United States v. Southeastern Underwriters Ass'n*²⁰⁷ where the inclusion of insurance under the Sherman Act did affect traditional state regulation. Other current examples of instances where the interpretation given to a federal law affects state power are in such fields as labor law,²⁰⁸ power regulation,²⁰⁹ and control over railroads.²¹⁰

Conflict between Federal and State Laws.—With the deference

²⁰⁵ This could of course result in prosecutions under state law, undoubtedly one of the purposes of the Wagering Act. Since the Fifth Amendment does not protect against possible incrimination under state laws, no constitutional issue is thereby raised. Mr. Justice Black, however, maintained that registration information could be a basis for prosecution for gambling before registration. 345 U.S. 22, 36 (1953). But if one grants that this is a tax, is such registration any different from an income tax return, which can also be used in the same way?

²⁰⁶ *Toolson v. New York Yankees, Inc.*, 74 Sup. Ct. 78 (1953). On the intent question, the main difference between the majority and the two dissenters is that the former relies entirely on the 1922 decision of *Federal Baseball Club v. National League*, 259 U.S. 200. But that case merely held that the contracts of players then were state concern and not interstate commerce because of transportation of players. Today, however, the entire business of baseball is integrated with interstate commerce.

²⁰⁷ 322 U.S. 533 (1944).

²⁰⁸ *Alstate Construction Co. v. Durkin*, 345 U.S. 13 (1953); *Thomas v. Hempt Bros.*, 345 U.S. 19 (1953).

²⁰⁹ *United States ex rel. Chapman v. Federal Power Commission*, 345 U.S. 153 (1953).

²¹⁰ *New York, N.H. & H.R.R. v. Nothnagle*, 346 U.S. 128 (1953); *King v. United States*, 344 U.S. 254 (1952).

which the Supreme Court has shown to Congress in the field of interstate commerce, the constitutionality of many state laws depends on whether they conflict with congressional intent. Thus, in *Transcontinental and Western Air, Inc. v. Koppal*,²¹¹ the Supreme Court held that an employee subject to the grievance procedures of the Railway Labor Act could nevertheless still resort to an action at law for alleged unlawful discharge, if the state courts recognized such a claim. Aside from regulations of labor standards and collective bargaining, an area where the conflict between the national Government and the states has been particularly intense, is that involving the control of electrical power. In *United States v. Public Utilities Commission*²¹² the Supreme Court of the United States overruled both the state commission and the California Supreme Court and held that the Federal Power Commission had jurisdiction to regulate rates charged by the California Electric Power Company to the Navy Department and to a Nevada county. Following production in California, the power was transmitted to a company substation within the state and there taken across the state border by the two customers on their own high voltage lines. A much more traditional and older area of conflict is that between state compensation laws and the Federal Employees' Liability Act, as exemplified in *South Buffalo Ry. v. Ahern*.²¹³ Here a proceeding under the compensation law was upheld, at least where its remedy was permissive and only took effect after the parties waived any interstate commerce rights and remedies.

Among state court and lower federal court decisions on possible conflict between federal and state regulations, the New York Court of Appeals held that the Federal Motor Carriers Act did not exclude the application of the state registration requirement to an interstate trailer truck which transported property from one point in the state to another.²¹⁴ The Supreme Court of Florida, however, declared that the state Public Utility Arbitration Law was invalid as a limitation on the right to strike protected by the National Labor Relations Act.²¹⁵ Similarly, an Iowa statute prescribing the power of locomotive headlights was held to be superseded by the less rigorous standard of the Interstate Commerce Commission.²¹⁶ An example of federal-state co-operation is found in the fair-trade field where as a result of the recent *Schwegmann* decision²¹⁷ the McGuire Act²¹⁸ was passed. Under this

²¹¹ 345 U.S. 653 (1953).

²¹² 345 U.S. 295 (1953).

²¹³ 344 U.S. 367 (1953), 29 N.Y.U.L. Rev. 228.

²¹⁴ *People v. Learned*, 114 N.E.2d 9 (N.Y. 1953).

²¹⁵ *Henderson v. State ex rel. Lee*, 65 So.2d 22 (Fla. 1953).

²¹⁶ *Brown v. Chicago, R.I. & P.R.R.*, 108 F.Supp. 164 (N.D. Iowa 1952).

²¹⁷ *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951).

²¹⁸ 66 Stat. 632 (1952), 15 U.S.C.A. § 45 (Supp. 1953).

the operation of the Sherman Act is removed from state fair-trade laws which cover nonsigners as well as signers of a minimum price agreement.²¹⁹ Two Connecticut decisions upheld a fair-trade price applied to liquor in view of the federal constitutional provision forbidding importation into a state in violation of the laws thereof.²²⁰

State Regulations and Taxes as a Burden on Interstate Commerce.—If Mr. Justice Black had his way state laws in the area of interstate commerce would be illegal only if they were inconsistent with congressional intent or if they discriminated against interstate commerce. Ever since *Brown v. Maryland*,²²¹ however, a majority of the Court has asked the much more nebulous question: does this law burden the free flow of interstate commerce?

Under such a burden standard cases continue to arise which concern the validity of state taxes. The line between the states' inherent right to tax and the flow of interstate commerce was further pinpointed in three recent decisions of the Supreme Court as well as in others from state and lower courts. Involved in *Chicago v. Willett Co.*²²² was a truck ordinance requiring a license fee, based on capacity, of all trucks doing business within the city. Much of the company's business was carrying property which never left the city but, since in each load some was destined for other states, it was argued that the tax was on interstate commerce. In holding the tax legal the Court emphasized the fact that Chicago was the home city, that the tax was aimed only at the intrastate business and that the taxpayer had not affirmatively shown any burden on interstate commerce. However, asked Mr. Justice Douglas in dissent, did not the interstate business increase the number of trucks and hence the amount of the tax? Similarly, but with a more intense dissent, the Court in *Bode v. Barrett*²²³ also validated an Illinois license tax applied to interstate vehicles and measured by gross weight, on the basis that each carrier did an intrastate business as well. No showing was made, said the majority, that the tax bore no reasonable relation to the purely intrastate use of the highways. More difficult was the case of *Lloyd A. Fry Roofing Co. v. Wood*²²⁴ where by a five-to-four vote carriers exclusively in

²¹⁹ In *Eli Lilly Co. v. Schwegmann Bros.*, 109 F.Supp. 269 (E.D. La. 1953) no antitrust issue was raised in view of the McGuire Act. The court held no delegation was made to private persons to fix resale prices; rather the state fair-trade law was an appropriate means to protect the manufacturer's ownership of his trade-mark.

²²⁰ *Schwartz v. Kelly*, 99 A.2d 89 (Conn. 1953); *Beckanstin v. Liquor Control Commission*, 99 A.2d 119 (Conn. 1953). See Note, 38 Iowa L. Rev. 345 (1953).

²²¹ 12 Wheat. 419 (U.S. 1827).

²²² 344 U.S. 574 (1953).

²²³ 344 U.S. 583 (1953).

²²⁴ 344 U.S. 157 (1952).

interstate commerce were held subject to an Arkansas permit statute. The division of opinion, however, was on the meaning of the requirement. Where the minority insisted that the permit was actually a "certificate of public convenience and necessity," a condition precedent to doing business in the state, the majority pointed out that Arkansas disclaimed any right to refuse the permit and wished the license for reasons of identification.

Among tax cases in other courts, the Supreme Court of Florida upheld the requirement of a certificate of public convenience where the purpose was to prevent the inordinate use of public highways.²²⁶ New York City's sales tax was declared constitutionally inapplicable to solicitation of orders which had to be approved and processed in another state.²²⁶ According to the Supreme Court of Nebraska, the personal property tax could be levied on an airline's flight equipment used only in interstate commerce, provided the assessed value bore a reasonable relation to the use in the state.²²⁷ Numerous other state decisions²²⁸ involved similar traditional issues in this field.

VII

DUE PROCESS OF LAW

Literally hundreds of cases each year apply the standard of due process of law to both civil and criminal procedure. In contrast, during the early period of the New Deal and for several decades earlier, the issues were economic and substantive. For example, could the states, or later Congress, interfere with the "liberty" of employer and employee to contract on hours or wages—or was it lack of due process of law? Today's questions on substantive due process concern either a specific civil right, in that the Fourteenth Amendment has absorbed the fundamentals of the Bill of Rights and applied it to the states, or routine questions of zoning or licensing or rate-making. Thus, in the Jehovah's Witness cases of this year we have already seen the application of freedom of speech and of religious worship via the due process clause of the Fourteenth Amendment.²²⁹ One issue of confiscatory rates imposed by the Interstate Commerce Commission was raised

²²⁵ *Stewart v. Mack*, 66 So.2d 811 (Fla. 1953).

²²⁶ *National Steel Corp. v. City of New York*, 121 N.Y.S.2d 61 (Sup. Ct. 1953).

²²⁷ *Mid-Continent Airlines, Inc. v. Board of Equalization and Assessment*, 59 N.W.2d 746 (Neb. 1953).

²²⁸ *Cordell v. Commonwealth*, 254 S.W.2d 484 (Ky. 1953) (license tax on mail-order photographer discriminatory); *Tax Commission v. Ensign*, 75 Ariz. 220, 254 P.2d 1029 (1953) (privilege tax on out-of-state distributor valid); *Southwestern Gas and Electric Co. v. Tax Commission*, 253 P.2d 549 (Okla. 1953) (allocated income tax good); *Gross Income Tax Division v. Surface Combustion Corp.*, 111 N.E.2d 50 (Ind. 1953) (unconstitutional sales tax).

²²⁹ Page 84 supra.

this year without success before the Supreme Court in *Baltimore and Ohio R.R. v. United States*.²³⁰

In the area of criminal procedure many federal cases are, of course, decided on the basis of specific protections in the Bill of Rights, such as the guarantee of indictment, of trial by jury, and the currently much-abused protection against self-incrimination. The administration of state criminal laws, however, has been regarded by the Supreme Court as primarily the responsibility of the states, with due process requiring only that the total proceeding must not violate general conceptions of fairness and decency. A recent example of this general approach is *Brock v. North Carolina*²³¹ where the Supreme Court held the state had not violated fundamental essentials of a fair trial. At the request of the prosecution the trial judge had declared a mistrial and had then required the defendants to be presented before another jury at a time when two key witnesses could testify. Involved in *Stein v. New York*²³² was the issue of the voluntariness of a confession by two defendants in a murder trial. Granting that a coerced verbal confession is generally unreliable, a majority of the Supreme Court nevertheless found no lack of due process since there was other evidence sufficient to warrant a conviction. For the dissenters this holding was a retrogression from previous decisions that a coerced confession is itself lack of due process. A third recent example of this relationship between the Federal Constitution or laws and state autonomy over criminal trials is *Schwartz v. State*.²³³ The case decided that the Federal Communications Act prohibiting wire-tapping should not be construed to prohibit the use of evidence so obtained in state criminal trials. Although only the interpretation of a statute was at issue, the approach in the case is similar to that found on questions involving self-incrimination. Thus, the Fifth Amendment does not prevent the use, in state courts, of illegally obtained evidence.

²³⁰ 345 U.S. 146 (1953).

²³¹ 344 U.S. 424 (1953).

²³² 346 U.S. 156 (1953).

²³³ 344 U.S. 199 (1953).

ADMINISTRATIVE LAW

BERNARD SCHWARTZ

THE YEAR 1953 was characterized by an unusually large number of noteworthy administrative-law cases decided by the nation's highest tribunal. The most significant of them were two decisions dealing with different aspects of the Administrative Procedure Act (APA).¹ And both of them contribute significantly to what has been termed the erosion of that statute.² Nor were the other decisions of the Court more favorable to the claims of the private parties. Indeed, except for two unimportant cases,³ the 1953 jurisprudence of the Supreme Court was characterized by judicial approval of administrative assertions of authority. Yet, if the case law was not particularly encouraging to those interested in vindicating individual rights even in an era of ever-expanding administrative authority, there were other developments which appear to be more hopeful. The most important of them were the reconstitution of the Hoover Commission, with expanded powers, and the call by the President of a Conference on Administrative Procedure. These bodies could well provide the impetus for a new movement for administrative-procedure reform similar to that which led to the enactment of the APA.

President's Conference on Administrative Procedure.—On April 29, the President issued a call for a Conference of representatives of the federal agencies, the judiciary, and the bar to study the subject of administrative procedure. The President directed the Attorney General to select the agencies which were to designate delegates to the Conference and named directly as members three federal judges, twelve practicing lawyers, and three federal trial examiners. Judge E. Barrett Prettyman of the Court of Appeals for the District of Columbia was designated as Chairman. Among the important matters which the Conference is considering are the feasibility of uniform rules of agency procedure and the desirability of establishing an Office of Federal Administrative Procedure.

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¹ *Ramspeck v. Federal Trial Examiners Conference*, 345 U.S. 128 (1953); *Heikkila v. Barber*, 345 U.S. 229 (1953).

² See, e.g., Rhyne, *The Administrative Procedure Act; Five-year Review Finds Protections Eroded*, 37 A.B.A.J. 641 (1951).

³ *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953), unimportant because it was limited to its facts in *Shaughnessy v. United States ex rel. Mezel*, 345 U.S. 206 (1953); *FCC v. RCA Communications*, 346 U.S. 86 (1953), which did not deal with the merits of the challenged action and practically assured judicial approval of such action if repeated on remand.

The calling of the President's Conference appears to have come at a particularly opportune time. There is need today of a study of administrative organization and procedure comparable to that made by the Attorney General's Committee over a decade ago. Such a study should concentrate upon the effect which the APA has actually had upon the administrative process; what deficiencies and gaps there are in that Act as they are shown in the actual practice of the agencies; how these deficiencies and gaps can be remedied; and what, if any, other remedial legislation is needed in the field of administrative law. The Attorney General's Committee did extremely valuable work. But its report and studies are now outdated. They were made before the war and before the APA. Administrative authority has grown by leaps and bounds since the Committee reported. We know that we have the APA; and we know how its provisions read on paper. What we do not know is whether and to what extent they have proved effective in *practice* in canalizing the great post-1941 growth of administrative power. The best way to get the necessary information would appear to be by further use of the "royal commission" technique which worked so well in the case of the Attorney General's Committee.

It is, of course, recognized that the ultimate answer, in a field which changes so rapidly, is continuing study. "I am convinced," declared the Attorney General in welcoming the President's Conference, "that we must give to the improvement of administrative procedure the kind of continuous effort that has produced the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure."⁴ Such effort can only be given by a permanent body established for the purpose. Such a body would exist with the establishment of an Office of Administrative Procedure, like that strongly recommended by the Attorney General's Committee.⁵ The President's Conference has now seconded this recommendation⁶ and it is hoped that, this time, it will at last be put into effect.

⁴ Brownell, *The President's Conference on Administrative Procedure*, 39 A.B.A.J. 813 (1953).

⁵ Rep. Att'y Gen. Comm. Ad. Proc. 123 (1941).

⁶ The Conference's recommendation on this point, approved November 24, 1953, reads as follows:

"The Conference recommends to the President of the United States the establishment of an Office of Administrative Procedure.

1. That the Office perform the following functions:

(a) carry on continuous studies of the adequacy of the procedures by which Federal agencies determine the rights, duties, and privileges of persons;

(b) initiate cooperative effort among the agencies and their respective bars to develop and adopt as far as practicable uniform rules of practice and procedure;

(c) collect and publish facts and statistics concerning the procedures of the agencies;

Right To Be Heard.—One of the most significant American administrative-law doctrines is that which distinguishes between so-called "rights" and "privileges" for the purpose of determining procedural requirements in particular cases. Although one starts with the proposition that administrative exercises of adjudicatory authority must be preceded by full notice and hearing as a matter of due process, our courts have held that this is true only in cases involving personal or property "rights." If the case is characterized by the courts as one involving only a privilege, there is no requirement that those affected be heard, unless the enabling statute expressly imposes such requirement.⁷

In the federal field, the privilege-right distinction has been used most frequently in cases involving the exclusion and deportation of aliens. Ever since the *Japanese Immigrant* case,⁸ it has been recognized that an alien has a constitutional right to be heard before a deportation order is issued against him. An alien seeking entry into this country, on the other hand, does not have any such due-process right to a hearing. As Mr. Justice Murphy once expressed it, "The Bill of Rights is a futile authority for an alien seeking admission for the first time to these shores. But once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders."⁹ An alien who has entered the country is thus seen to have acquired a "right" in remaining here, of which he cannot be deprived without a hearing. The alien requesting entry is seeking only a "privilege" that can be granted or denied on any terms which the legislature wishes.

The use of the distinction between so-called rights and privileges as the basis for determining whether a particular alien has a right to be heard has been much criticized. Insofar as procedural due process is concerned, is there really adequate reason for differentiating the position of an alien seeking entry from that of one being deported simply because admission to the United States is termed a privilege instead of a property right? From the point of view of its effect upon the individual, regardless of the tag used, an exclusion proceeding may often

(d) assist agencies and this Conference in the formulation and improvement of their administrative procedures.

2. That the Office be established in the Department of Justice under the supervision of the Attorney General.

3. That the Office shall consist of a Director and a staff. . . ."

⁷ See *Swital v. Real Estate Comm'r*, 254 P.2d 587 (Cal. App. 1953) ("right"); *Walker v. City of Clinton*, 59 N.W.2d 785 (Iowa 1953) ("privilege"). Compare *Angilly v. United States*, 199 F.2d 642 (2d Cir. 1952) (government employee does not have right to his job).

⁸ 189 U.S. 86 (1903).

⁹ *Bridges v. Wixon*, 326 U.S. 135, 161 (1945).

be of the very essence of what the procedural safeguards of notice and hearing are designed for. This is especially true in the case of a resident alien, temporarily absent from the country, who is seeking re-entry. Certainly, as far as he is concerned, exclusion will have much the same impact as the ordinary deportation order and it is unreal to treat him only as an alien seeking the privilege of entry to our shores.

In its decision in *Kwong Hai Chew v. Colding*¹⁰ the Supreme Court appears to have recognized that the right-privilege distinction alone is not enough to bar the right of a re-entering resident alien to be heard. The Court there held that the Attorney General's power under a regulation to bar, without hearing during the national emergency, the entry of aliens into the United States whose presence was deemed inimical to national security, provided that the Attorney General determined that the order was based upon confidential information the disclosure of which would be prejudicial to the public interest, did not include the power to exclude summarily a lawful permanent resident-alien seaman returning from a voyage to foreign ports. The Court stated that it did not regard the constitutional status which the alien indisputably enjoyed prior to his voyage as terminated by that voyage. From a constitutional point of view, he is entitled to due process without regard to whether or not, for immigration purposes, he is to be treated as an entrant alien. While it may be that a resident alien's right to remain in the United States is subject to alteration by statute or regulation because of a voyage undertaken by him to foreign ports, it does not follow that he is thereby deprived of his constitutional right to procedural due process. His status as a person within the meaning and protection of the Fifth Amendment cannot be capriciously taken from him.

If the *Kwong Hai Chew* case stood by itself, it could be argued that its holding places the resident alien seeking re-entry in a position analogous to that of a resident alien in a deportation proceeding. But that case does not stand alone, for it was soon followed by *Shaughnessy v. United States ex rel Mezei*,¹¹ which limited the *Chew* case to its facts. The *Mezei* case involved an alien immigrant excluded from the United States on security grounds but stranded on Ellis Island because other countries would not take him back. The alien had been a resident of this country from 1923 to 1948, when he left on a visit to Europe. On returning in 1950, he was ordered excluded without a hearing, on the "basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest." The Court, in a five-to-four decision, held that this was an ordinary exclusion proceed-

¹⁰ 344 U.S. 590 (1953).

¹¹ 345 U.S. 206 (1953).

ing and the alien could therefore be barred from entry without a hearing.

Even if one accepts the established distinction between exclusion and deportation cases, there is room for some uneasiness about the Court's holding. Petitioner here was not the ordinary alien seeking entry to this country. He had been a resident for twenty-five years and had left on what he had expected would be a temporary visit abroad. Upon his return, he was held for two years a prisoner on Ellis Island without charge or conviction for any crime. According to Mr. Justice Clark, who delivered the Court's opinion, these factors do not make any difference to the decision of the case. "Neither respondent's harborage on Ellis Island nor his prior residence here transforms this into something other than an exclusion proceeding."¹²

In *Kwong Hai Chew v. Colding*, as has been pointed out, the Court had held that a resident-alien seaman who was temporarily absent upon a voyage to foreign ports could not, upon his return, be deprived of his constitutional right to be heard. His status was, in effect, assimilated by the Court to that of continuously present alien residents entitled to hearings before they could be deported. The instant case, said the Court, differs from the situation in the *Chew* case. Here, there was a clear break in the alien's continuous residence. In such circumstances, the alien is held to be assimilated to the status of only an entrant alien. That being so, the Attorney General may lawfully exclude him without any hearing. Nor need he disclose the evidence upon which that determination rests.

The Court's attempt to assimilate the present case to that of the ordinary entering alien was sharply rejected by the four dissenting justices. Exclusion of an alien without judicial process, declared Mr. Justice Jackson, may not deny due process when it can be accomplished merely by turning him back on land or returning him by sea. But when indefinite confinement becomes the means of enforcing exclusion, due process requires that the alien be informed of its grounds and have a fair chance to overcome them. And, even apart from the element of hardship involved in Mezei's indefinite confinement, the Court's attempt to distinguish the *Chew* case does not appear wholly convincing. If any alien should be assimilated to the status of an alien in a deportation case it is one like Mezei, who has lived here for a quarter of a century as a lawful and law-abiding inhabitant. If the *Chew* case turns only on its particular facts, then its effect is most narrow. Maritime service such as Chew's can be deemed not to constitute a break in his continuous residence here.¹³ But re-entering resident aliens other than

¹² Id. at 213.

¹³ This is true, for example, under § 307 of the Nationality Act of 1940. 54 Stat. 1142, 8 U.S.C. § 707 (1946).

seamen are to be treated solely as entering aliens seeking the privilege of admission to the United States. The *Mezei* case thus reaffirms the privilege-right distinction in the field of immigration law and denies that even the re-entering resident alien has any constitutional procedural rights. It limits the *Chew* case, which by itself seemed to make for a needed liberalization of the law, to its particular facts, which are, of course, not those met with in the vast majority of cases involving re-entering aliens.¹⁴

Ex parte Evidence.—The basic principle of exclusiveness of the record was at issue in *United States v. Nugent*.¹⁵ It involved an appeal by a conscientious objector from his local draft board's denial of his claim for exemption from service. Under the statute, such appeals are referred by the appeal board to the Department of Justice for its recommendation. The Department is required to hold a "hearing" before action. In performing its functions under this law, the Department has used the FBI to investigate each appealing registrant's case. A hearing is then held before a designated hearing officer. The registrant is permitted to appear and to bring an advisor and witnesses. He is entitled to be instructed as to the general nature and character of any unfavorable evidence developed by the Department's investigation. But he is not permitted to see the FBI report, nor is he informed of the names of persons interviewed by the investigators.

The court of appeals held that the procedure just outlined violated the registrant's right to be heard under the Selective Service Act. The Supreme Court disagreed, asserting that the statutory requirement of a "hearing" was satisfied when the registrant was accorded an opportunity to speak his piece before an impartial hearing officer, when he was permitted to produce all relevant evidence in his own behalf, and was at the same time supplied with a résumé of any adverse evidence in the investigator's report.

There appears to be little doubt but that, in the normal case where the private individual has a right to be heard prior to administrative action that adversely affects him, the basic principle is that of exclusiveness of the record. If the agency bases its decision upon material

¹⁴ For a case following the *Mezei* case, see *United States ex rel. Bojarchuk v. Shaughnessy*, 206 F.2d 238 (2d Cir. 1953). Other cases involving the right to be heard include *Mississippi River Fuel Corp. v. FPC*, 202 F.2d 899 (3d Cir. 1953); *Marine Engineers' Ass'n v. NLRB*, 202 F.2d 546 (3d Cir. 1953); *United States v. McCrillis*, 200 F.2d 884 (1st Cir. 1952); *Parker v. Lester*, 112 F. Supp. 433 (N.D. Cal. 1953); *Application of Muscarella*, 281 App. Div. 565, 121 N.Y.S.2d 382 (4th Dep't 1953); *Tilelli v. Christenberry*, 120 N.Y.S.2d 697 (Sup. Ct. 1953); cf. *Bergsma v. Town of Kearny*, 24 N.J. Super. 43, 93 A.2d 626 (App. Div. 1952).

¹⁵ 346 U.S. 1 (1953), reversing 200 F.2d 46 (2d Cir. 1952).

not contained in the record, its action will be set aside.¹⁶ This is a fundamental principle, for the right to a hearing would itself be of little value if the agency could completely disregard the record and base its decision instead upon *ex parte* evidence. Why is it that this normal rule does not apply in the instant case? According to Chief Justice Vinson, the reason is that the word "hearing" used in the Selective Service Act does not have the meaning that it does in other administrative-law cases. The word here does not comprehend the formal and litigious procedures which it normally does. Instead, the word takes its meaning in this instance from an analysis of the precise function which Congress has imposed upon the Department of Justice.

But what is it that makes the Department's function here so different from that normally met with in our administrative law? The statute places upon the Department the duty of determining whether the facts of his case place the registrant within the statutory concept of "conscientious objector." This would seem to be the very essence of administrative adjudicatory authority, of the type now vested in innumerable federal agencies. The Court asserts that this is not true because the duty to classify rests, not on the Department of Justice, but on the appeal board. It is, however, difficult to see how the fact that an agency does not make the determinative decision in a case changes the nature of the function it is exercising. And this is especially true where, as in this case, the recommendation of the Department of Justice is bound to weigh so heavily with the deciding agency.

As is always the case where it rejects the individual's claim to an adversary hearing, the Court relied upon *Norwegian Nitrogen Products Co. v. United States*.¹⁷ Yet that case does not support the Court's decision. It involved the action of the Tariff Commission prior to an increase by the President of a tariff rate under the flexible tariff provisions of the Tariff Act of 1922. Its action was but a stage in the executive performance of a function clearly legislative in nature—i.e., the increase of a tariff rate. It is well recognized that there is no constitutional right to be heard prior to most agency exercises of legislative authority and, even if a statute requires a hearing, unless the statute expressly says so, the hearing need not be the formal adversary type required prior to agency adjudications. That is all that the *Norwegian Nitrogen* case stands for. Its rule is inapplicable to a case like the instant one where the agency action at issue was a stage in the performance of an adjudicatory function. It is most unfortunate that Mr. Justice Cardozo's masterly opinion in *Norwegian Nitrogen* has been used in a manner never intended by its author. All he sought to show was that

¹⁶ See, e.g., *Curtis v. State Police Merit Board*, 349 Ill. App. 448, 111 N.E.2d 159 (1953).

¹⁷ 288 U.S. 294 (1933).

the hearing required by Congress in connection with exercises of the tariff-fixing function (one legislative in nature) need not be, unless Congress specifies otherwise, of the formal adversary type. But the Court, as in the instant case, has used Mr. Justice Cardozo's opinion to support it whenever it has held that a full hearing was not required—a use that involves an unwarranted extension of Mr. Justice Cardozo's reasoning.¹⁸

Examiners and the APA.—The intent of the sponsors of the APA greatly to improve the calibre of the federal hearing officer has been largely defeated thus far by what has been aptly referred to as the "hearing examiner fiasco"¹⁹ under the Act. Ensuring the appointment of competent examiner personnel under Section 11 was, however, intended by the draftsmen of the APA to resolve only part of the hearing-officer problem. Just as important to them were the provisions of Section 11 respecting the independence and tenure of examiners, which were intended, in the words of Senator McCarran, the senatorial sponsor of the APA, to "make examiners a separate and independent corps of hearing officers worthy of judicial traditions."²⁰ As is now well

¹⁸ Other procedure cases are: *Evidence*: *Wales v. United States*, 108 F. Supp. 928 (N.D. Tex. 1952) (documentary evidence); *Wisconsin v. FPC*, 201 F.2d 183 (D.C. Cir. 1952) (official notice); *NLRB v. Amalgamated Meat Cutters*, 202 F.2d 671 (9th Cir. 1953) (findings based on hearsay alone).

Cross-examination: *Beaumont Broadcasting Corp. v. FCC*, 202 F.2d 306 (D.C. Cir. 1952); *Carter Products v. FTC*, 201 F.2d 446 (9th Cir. 1953). Compare *Lawrence v. Nutter*, 203 F.2d 540 (4th Cir. 1953).

APA: *Belizaro v. Zimmerman*, 200 F.2d 282 (3d Cir. 1952); *United States ex rel. Lombardo v. Bramblett*, 114 F. Supp. 183 (N.D. Ohio 1953) (exemption of immigration cases from APA constitutional); *Democrat Printing Co. v. FCC*, 202 F.2d 298 (D.C. Cir. 1952); *NLRB v. Kanmak Mills*, 200 F.2d 542 (3d Cir. 1952) (separation of functions); *Alabama-Tennessee Gas Co. v. FPC*, 203 F.2d 494 (3d Cir. 1953) (intermediate decision procedure).

Rehearing: *Atlas Powder Co. v. Ewing*, 201 F.2d 347 (3d Cir. 1952); *McMahon v. Ewing*, 113 F. Supp. 95 (S.D.N.Y. 1953); *Monumental Motor Tours v. United States*, 110 F. Supp. 929 (D. Md. 1953); *New Jersey Bell Tel. Co. v. Department of Pub. Util.*, 12 N.J. 568, 97 A.2d 602 (1953).

Findings: *Automatic Canteen Co. v. FTC*, 346 U.S. 61 (1953); *State Corp. Comm'n v. FPC*, 206 F.2d 690 (8th Cir. 1953); *Public Util. Comm'n v. FPC*, 205 F.2d 116 (3d Cir. 1953); *Baltimore & O.R.R. v. United States*, 201 F.2d 795 (3d Cir. 1953); *Little Man's Club v. Schott*, 60 So.2d 624 (Fla. 1952); *Public Serv. Comm'n v. Fort Wayne Ry.*, 111 N.E.2d 719 (Ind. 1953); *New York Cent. R.R. v. Public Util. Comm'n*, 159 Ohio St. 524, 112 N.E.2d 667 (1953); *New England Tel. & Tel. Co. v. Kennelly*, 98 A.2d 835 (R.I. 1953).

See also *Dart Transit Co. v. ICC*, 110 F. Supp. 876 (D. Minn. 1953) (bill of particulars); *NLRB v. MacSmith Co.*, 203 F.2d 868 (5th Cir. 1953) (advocative approach of examiner); *Herman v. Dulles*, 205 F.2d 715 (D.C. Cir. 1953) (power of agencies to control practice before them); *Johnson Packing Co. v. NLRB*, 204 F.2d 842 (5th Cir. 1953) (subdelegation of subpoena power).

¹⁹ Fuchs, *The Hearing Examiner Fiasco under the Administrative Procedure Act*, 63 Harv. L. Rev. 737 (1950).

²⁰ McCarran, *Three Years of the Federal Administrative Procedure Act—A Study in Legislation*, 38 Geo. L.J. 574, 583 (1950).

known, the provisions of Section 11 looking to the appointment of qualified examiners have been given anything but the effect which they were intended to have. Have that section's provisions seeking to safeguard the independence of examiners fared any better?

With regard to these provisions, too, it is impossible to conclude that effect has really been given to the intention of the draftsmen of Section 11 of the APA. The regulations of the Civil Service Commission on the subject provided, with regard to the key question of the promotion of examiners, that the agency concerned would be permitted to select the examiner to be promoted subject to the retroactive approval of the Commission. This so clearly violated the intent of the 1946 Act that examiners should be in a position of independence that the promotion regulation was pronounced invalid in an opinion of the Attorney General at the beginning of 1951.²¹ In September 1951, the Commission promulgated revised regulations regarding the appointment, compensation, and removal of hearing examiners. These, too, were, however, challenged as invalid, and such challenge resulted in the case of *Ramspeck v. Federal Trial Examiners Conference*.²²

The action in that case was brought by an unincorporated association of federal examiners and a number of individual examiners against the members of the Civil Service Commission and the National Labor Relations Board for a declaratory judgment that the Commission's hearing-examiner regulations were invalid and for an injunction against their enforcement. Although both the district court and the court of appeals held that the regulations were contrary to the APA, the Supreme Court reversed, holding that the Commission had not failed to conform to the statute and carry out the purpose and intent of Congress. One of the principal objections raised by petitioners to the Commission's regulations was directed to the fact that they set up a classification of hearing examiners into grades, with salaries appropriate to each grade, in each federal agency using examiners. This classification ranged from just one grade in several agencies to five grades in two agencies. The Supreme Court held that in so classifying examiners the Commission was doing just what Congress directed it to do, for Section 11 of the APA expressly directs that "Examiners shall receive compensation . . . in accordance with the Classification Act of 1923, as amended."

The lower courts had been particularly critical of the specifications used by the Commission in its regulations to classify examiners, the district court characterizing them as "nebulous and subjective."²³

²¹ 41 Ops. Att'y Gen. No. 14 (1951).

²² 345 U.S. 128 (1953), reversing 202 F.2d 312 (D.C. Cir. 1952).

²³ *Federal Trial Examiners Conference v. Ramspeck*, 104 F. Supp. 734, 740 (D.D.C. 1952).

To classify the positions into the different grades, the Commission used such specifications as to job content as "moderately difficult and important," "difficult and important," "unusually difficult and important," "exceedingly difficult and important," and "exceptionally difficult and important." According to the Supreme Court the specifications used in this case of necessity must be subjective. They are not based so much on evidence as on judgment. It is a discriminating judgment and one Congress committed to the experience and expertise of the Civil Service Commission, not the courts.

It should be noted that, under the regulations of the Commission, the classification of examiners within each agency determined not only the compensation which examiners were to receive but also the type of work which they were to perform. And, despite the provision of Section 11 of the APA requiring examiners to be assigned to cases in rotation so far as practicable, the relevant regulation provided for assignment of examiners in rotation to "cases of the level of difficulty and importance that are normally assigned to positions of the salary grade they hold." Though Section 11 seems to intend a mechanical rotation among all the examiners in an agency, the Supreme Court held that, in view of the classification of examiners by the Commission, the rotation could for practical reasons be adjusted to the classifications. This was an allowable judgment by the Commission, said the Court, as to what was practicable.

Even if one agrees with the decision of the Court that these regulations are within the power of the Civil Service Commission, it is to be doubted whether he will become wholly convinced that they are truly calculated to carry out the intent of the framers of the APA concerning the status of hearing examiners. And even with regard to the bare question of the legality of the regulations, it is significant that Chief Judge Laws in the district court, the majority of the court of appeals, and three justices of the Supreme Court were of the opinion that the Commission had acted *ultra vires* Section 11 of the 1946 Act.²⁴ "I do not agree with the court," asserted Mr. Justice Black, who delivered the dissenting opinion in the highest Court, "that the Classification Act of 1923 or any other act of Congress authorized the distinctions here made between examiners. In fact, the APA appears to contemplate that all examiners employed by a particular agency stand on equal footing in regard to service and pay. A central objective was to prevent agency heads from using powers over assignments to influence cases. Unlimited discretion in assignment would lead to subservient examiners, it

²⁴ Of the thirteen judges who considered the case, the aggregate opinion on the validity of the regulations was seven for and six against.

was thought. But the effect of the Civil Service classifications is to restore the unlimited discretion existing before passage of the APA."²⁶

According to Mr. Justice Black the distinctions depended upon to support the different classifications of examiners are so nebulous that the agency head is left practically free to select any examiner he chooses for any case he chooses. The specifications used by the Civil Service Commission to classify examiners, which have already been touched upon, are seen to be so subjective as to leave the work of the examiners entirely within agency discretion, which is, of course, exactly the opposite of what the framers of the APA intended. "I think," asserted Mr. Justice Black at the end of his opinion, "all these conceptualistic distinctions mean is that the congressional command for a nonagency controlled rotation of cases is buried under words."²⁶

One familiar with the history of the operation in practice of the examiner system provided for under Sections 7 and 11 of the APA would, indeed, have to shut his eyes to reality for him to conclude that the provisions of the Act have been implemented in accordance with the intent of their draftsmen. In view of the way in which the Civil Service Commission has mishandled the task delegated to it under Section 11 of the 1946 Act, measures must be taken to improve the situation. This may go as far as having examiners appointed directly by the President, as is provided for in Sen. 1708 now before the Senate Judiciary Committee. This would go a long way toward meeting the intent expressed by the senatorial sponsor of the APA of having examiners "be very nearly the equivalent of judges."²⁷ If this step is felt to be too extreme and the job is left with the Civil Service Commission, that agency should delegate the job of administering Section 11 of the APA to a high official in the Commission, specially recruited for the purpose, of suitable qualifications and prestige.

Better perhaps than either of these alternatives is for the task of administering Section 11 to be taken away from the Civil Service Commission and vested in an independent Office of Administrative Procedure, comparable in dignity and responsibility to the Administrative Office of the United States Courts. It is high time that such an Office, whose establishment was strongly urged by the entire Attorney General's Committee, was set up. It would examine critically the practices and procedures of the federal administrative process and collect and collate information concerning them. An Office of this type has been set up in the State of California and its work thus far clearly appears to justify the extension of the experiment to the federal field.

²⁶ 345 U.S. 128, 144-45 (1953).

²⁶ *Id.* at 145.

²⁷ Sen. Doc. No. 82, 82d Cong., 1st Sess. 9 (1951), quoted in 345 U.S. at 144.

The California Office is responsible for the hearing officer personnel of the agencies of that state, and no complaints have been recorded with regard to its performance of this task. In view of the almost incredible way in which the Federal Civil Service Commission has botched up the examiner situation, it would be desirable to transfer the Commission's functions in this respect to the new Office, if and when it is created.²⁸

Preclusion of Review and the APA.—Perhaps the most significant limitation upon the right of review afforded by Section 10 of the APA is that contained in the introductory clause of that section, which limits the availability of review "so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion."²⁹

The applicability of the first of these limitations has been at issue most frequently in cases involving the deportation of aliens. The leading case prior to 1953 was *United States ex rel. Trinler v. Carusi*,³⁰ where the court held that the provision in the Immigration Act of 1917 that the administrative decision should be "final" did not preclude review under the APA. Such statutory declaration of finality, which has not precluded review by way of habeas corpus for many years, does not qualify as a bar to review within the meaning of Section 10 of the APA. The *Trinler* case has been followed in a number of federal cases³¹ and its holding appeared to be settled in federal law, especially after a unanimous Supreme Court had held that an alien could challenge a deportation order by a declaratory judgment proceeding, though without mention of the APA.³²

In *Heikkila v. Barber*,³³ however, the Court has expressly repudiated the holding of the *Trinler* decision and the cases following it. In that case, the Court held that an alien could not challenge the legality of a deportation order in a declaratory judgment proceeding, asserting that such order could be attacked only by habeas corpus, as had been the case prior to the APA. The alien had relied upon Section 10 of the APA as giving him a right of review, but the Court declared that the Immigration Act provision for administrative finality in deportation

²⁸ It should, however, be noted that the Office of Administrative Procedure recommended by the President's Conference on Administrative Procedure, *supra* note 6, would not be vested with any responsibility over hearing examiners.

²⁹ *Sellas v. Kirk*, 101 F. Supp. 237 (D. Nev. 1951), discussed in 1952 Annual Surv. Am. L. 121, 28 N.Y.U.L. Rev. 119 (1953), which deals with the second of these limitations, has been affirmed. 200 F.2d 217 (9th Cir. 1952). See also *Patton v. Civil Aeronautics Administrator*, 112 F. Supp. 817 (D. Alaska 1953).

³⁰ 166 F.2d 457 (3d Cir. 1948), discussed in 1948 Annual Surv. Am. L. 172.

³¹ See, especially, *Prince v. Commissioner*, 185 F.2d 578 (6th Cir. 1950); *Kristensen v. McGrath*, 179 F.2d 796 (D.C. Cir. 1949).

³² *McGrath v. Kristensen*, 340 U.S. 162 (1950).

³³ 345 U.S. 229 (1953).

cases came within the introductory clause of Section 10. According to Mr. Justice Clark, whatever view be taken as to the breadth of Section 10 of the APA, the first exception to that section applies to the instant case. The result is that the alien's rights were not enlarged by the APA. Now, as before, he may attack a deportation order only by habeas corpus.

The Court's decision in the *Heikkila* case appears to be as unsatisfactory as any which it has rendered in the field of administrative law in recent years. For the Court to hold that a provision for finality like that in the Immigration Act precludes review within the meaning of the introductory language at the beginning of Section 10 of the APA is for it to ignore both the background of provisions for administrative conclusiveness in our law and the actual facts with regard to the availability of review under the Immigration Act. The Court, as Mr. Justice Frankfurter said, in a strong dissenting opinion,

gives the phrase "judicial review" in § 10 a technical content and thereby disregards the vital fact that although § 19 of the Immigration Act of 1917 makes the decisions of the Attorney General "final," they are not finally final. As the hundreds of cases in the lower courts demonstrate, the Attorney General's actions are voluminously challenged and frequently set aside. . . . the decisive fact is that the findings of the Attorney General are subject to challenge in the courts and from time to time are upset, whatever the formulas may be by which what he has finally done is undone.⁸⁴

Fortunately, a more recent decision of the Court of Appeals for the District of Columbia indicates that the practical significance of the *Heikkila* case is limited to cases arising under the Immigration Act of 1917. Since that statute has been superseded by the Immigration and Nationality Act of 1952, under whose provisions deportation proceedings are now conducted, the *Heikkila* case loses its practical import, unless its holding is applicable to deportations under the 1952 Act. And, according to the court of appeals decision referred to, the 1952 law, far from adopting the *Heikkila* view that deportation orders may be judicially challenged only by habeas corpus, was expressly intended to make review under Section 10 of the APA available in such cases. The court relied in large part upon the legislative history of the 1952 Act, and especially the statement of Senator McCarran, its sponsor in the Senate, that "The Administrative Procedure Act is made applicable to the bill."⁸⁵

If the court of appeals is correct in its decision that *Heikkila v. Barber* does not apply to deportations under the Immigration Act of

⁸⁴ Id. at 238-39. For a case following the *Heikkila* case, see *Ng Gwong Dung v. Brownell*, 112 F. Supp. 673 (S.D.N.Y. 1953).

⁸⁵ *Rubinstein v. Brownell*, 206 F.2d 449, 455 (D.C. Cir. 1953).

1952, the undesirable consequences of that case will be all but done away with in practice. Yet, even if that is true, the *Heikkila* case still remains important because of what it tells us about the attitude of the highest Court toward the APA. Just as the *Wong Yang Sung* case³⁶ is significant because of its indication of an amicable approach on the part of the Court to the APA, so *Heikkila v. Barber* remains of moment for its suggestion of a change in the judicial mood. As Mr. Justice Frankfurter stated in his *Heikkila* dissent, the court of appeals decisions repudiated by the Court were based on the view that the "APA should be treated as a far-reaching remedial measure, affording ready access to courts for those who claim that the administrative process, once it has come to rest, has disregarded judicially enforceable rights."³⁷ In straining as it did to reach its decision in the *Heikkila* case, the Supreme Court has renounced this judicial attitude of hospitality, insofar as the availability of review under the APA is concerned. All that the Court itself said in its *Wong Yang Sung* opinion about the proper judicial reception of the APA would appear to constitute the best criticism of the Court's attitude in the *Heikkila* case. It is as an indication of the apparent recession of the Court from its *Wong Yang Sung* approach, indeed, that the *Heikkila* case is of primary importance.³⁸

Standing.—One of the most sharply criticized of Supreme Court administrative-law doctrines is that laid down in cases like *City of Atlanta v. Ickes*,³⁹ denying the standing of a consumer to seek review of an administrative order regulating a product or service purchased by him. Though recent cases in the lower courts⁴⁰ have been showing less hesitancy in upholding the standing of consumers, there has as yet been no express indication by our highest Court of a change in its jurisprudence. That is why a case like *Chapman v. Federal Power Commission*⁴¹ is of significance to a student of the Supreme Court. In it, the Court, according to the opinion of Mr. Justice Frankfurter, expressly held that two consumer organizations had standing to challenge an FPC order. Differences of view, however, precluded a single opinion of the Court on the point. Setting out the divergent grounds in support of standing would not, in the Court's view, further clarification of this complicated specialty of federal jurisdiction.

It cannot be denied that to have no opinion on an issue is even more unsatisfactory than the skeleton-like opinions which are all too often

³⁶ *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950); 1950 Annual Surv. Am. L. 106.

³⁷ 345 U.S. 229, 238.

³⁸ On preclusion of review, see *Hahn v. Gray*, 203 F.2d 625 (D.C. Cir. 1953) ("privilege" case).

³⁹ 308 U.S. 517 (1939).

⁴⁰ E.g., *National Coal Association v. FPC*, 191 F.2d 462 (D.C. Cir. 1951).

⁴¹ 345 U.S. 153 (1953).

coming to be rendered by the present Court. At the same time, we do have the express holding of the Court in favor of standing. It clearly appears to foreshadow a liberalization of that tribunal's harsh doctrine on the standing of consumers. That such liberalization is desirable is clear if one considers the merits of the Supreme Court's jurisprudence on consumer standing. Despite the Court's reluctance to find such standing, it is difficult to see why a consumer does not have a direct personal interest in administrative action which affects the product or service which he purchases. If the price which he has to pay is increased by administrative order, is it not to deal in abstract legal learning rather than the realities of the record⁴² to hold that he does not have a personal interest in having the order in question reviewed?

Ever since the well-known *Sanders* case⁴³ the federal case law has recognized that the economic interest of a competitor is sufficient to allow him to bring a review action. If that is true of a competitor, why is it not also true of a consumer whose economic well-being may also be wholly dependent upon the service which he uses, especially in the field of public utilities?

The answer which the Supreme Court has sometimes given,⁴⁴ that in cases of this type there are only two parties involved, the administrative agency and the company which is being regulated, simply does not square with the facts. It rests upon the proposition that the consuming public is adequately represented by the administration, which can be wholly relied upon to defend the public interest—a proposition which may often be, at best, a pious fiction in these cases.

In controversies of the type under discussion, unless a consumer is permitted to challenge the administrative action, it is unlikely that the legality of such action will ever be reviewed. In a practical sense, then, such action would be conclusive, for it would never be challenged by the only other parties involved, the agency and the company regulated by it. If the administrative action is beneficial to the company—such as an order raising the price of its product or services—it is only the consumer who is adversely affected and who will seek to challenge its validity.

In view of the role of the courts in enforcing the principle of administrative legality, it is of the utmost importance that agency action should not be treated as conclusive. In these cases review should be made available at the suit of the consumer, the one party who may have an interest in challenging the administrative action. As stated by the Court in the *Sanders* case, with regard to the standing of one injured economically by the grant of a license to a competitor:

⁴² Paraphrasing *Indianapolis v. Chase National Bank*, 314 U.S. 63, 69 (1941).

⁴³ *FCC v. Sanders Radio Station*, 309 U.S. 470 (1940).

⁴⁴ See *Smith v. Illinois Bell Tel. Co.*, 270 U.S. 587, 592 (1926).

Congress had some purpose in enacting § 402(b)(2). It may have been of opinion that one likely to be financially injured by the issue of a license would be the only person having a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission in granting the license.⁴⁵

The proper approach in cases of this kind is that followed by the Court of Appeals for the Second Circuit in *Reade v. Ewing*.⁴⁶ The court there held that petitioner's interest as a consumer sufficed to give him standing to challenge an order of the Federal Security Administrator regulating the vitamin content of oleomargarine. Judge Frank said:

The asserted consumer interest constitutes petitioner a person adversely affected. If Congress authorized the Attorney General to bring suit to restrain a federal officer from exceeding his statutory authority, such a suit would be a "case or controversy" satisfying the constitutional provision. . . . Congress, by authorizing certain persons within a described class—here those "adversely affected"—to bring actions to restrain such officers from transcending their statutory authority, validly creates a class of "private Attorney Generals" to vindicate the right of the United States against its wrongdoing officer.⁴⁷

It is recognized that this approach of Judge Frank may be contrary to that of the Supreme Court in consumer-standing cases. As one commentator has, however, expressed it, in discussing an earlier similar opinion of Judge Frank,⁴⁸ "this decision may well be an instance of the rare phenomenon of a lower court's decision superseding a recent Supreme Court decision."⁴⁹ On the merits, Judge Frank's approach certainly appears to be the sound one. In administrative-law cases the individuals bringing review actions are not merely in the position of ordinary parties plaintiff. They are also, to use Judge Frank's apt characterization, "private Attorney Generals." If the action to review is entrusted to private individuals, "it is to transform them into overseers of the Administration; they doubtless have a personal interest, but at the same time they act in the public interest; in this type of case, they are not merely parties defending their own right: their position approaches that of a district attorney pursuing the prosecution of a crime."⁵⁰

Parties Defendant.—In last year's Survey,⁵¹ attention was called to two district court decisions holding that the Commissioner of Immigra-

⁴⁵ *FCC v. Sanders Radio Station*, 309 U.S. 470, 477 (1940).

⁴⁶ 205 F.2d 630 (2d Cir. 1953).

⁴⁷ *Id.* at 632.

⁴⁸ *Associated Industries v. Ickes*, 134 F.2d 694 (2d Cir. 1943).

⁴⁹ Davis, *Administrative Law* 705 (1951).

⁵⁰ 2 Hauriou, *La Jurisprudence Administrative de 1892 à 1929* at 408 (1929). For another interesting standing case, see *American President Lines v. FMB*, 112 F. Supp. 346 (D.D.C. 1953).

⁵¹ 1952 Annual Surv. Am. L. 120, 28 N.Y.U.L. Rev. 118.

tion and Naturalization was an indispensable party in an action for review of a deportation order.⁵² One of those decisions was affirmed late in 1952⁵³ and there has been a similar holding with regard to the indispensability of the Secretary of the Interior as a party defendant in an action to enjoin a district range manager from reducing plaintiff's permitted grazing on public lands within the district.⁵⁴

As was pointed out last year,⁵⁵ cases like these hold, in effect, that review actions can be brought only in the District of Columbia. They do this by requiring the action to be brought against the agency head, who can only be sued in Washington, rather than against the local official of the agency, who is most readily accessible to the individual seeking review. Such cases appear to distort the rule of *Williams v. Fanning*,⁵⁶ where the Court greatly liberalized the requirement of parties defendant in review proceedings in order to facilitate the bringing of review actions. They are justified only if the goal of our administrative law is to make review as inconvenient and expensive as possible to those aggrieved by agency action. If, on the contrary, our aim is to insure availability of review upon the widest possible basis, there is no reason why actions cannot be brought in the district most convenient to the private party. It is formalistic fiction to treat the agency head as a private citizen who can be sued only in the district of his residence. It would normally cause no hardship to require the agency to respond in any district court. But, as far as the individual is concerned, requiring him to go to Washington to seek justice may be enough to induce him to forego his right of review.⁵⁷

⁵² *Paolo v. Garfinkel*, 106 F. Supp. 279 (W.D. Pa. 1952); *Birnes v. Commissioner*, 103 F. Supp. 180 (N.D. Ohio 1952).

⁵³ *Paolo v. Garfinkel*, 200 F.2d 280 (3d Cir. 1952). See, similarly, *Torres v. McGranery*, 111 F. Supp. 241 (S.D. Cal. 1953); *Savala-Cisneros v. Landon*, 111 F. Supp. 129 (S.D. Cal. 1953); *Navarro v. Landon*, 108 F. Supp. 922 (S.D. Cal. 1952); *Chavez v. McGranery*, 108 F. Supp. 255 (S.D. Cal. 1952). It should be noted that, under *Helkila v. Barber*, 345 U.S. 229 (1953), this type of direct review proceeding is no longer available in deportation cases. But see *Rubinstein v. Brownell*, 206 F.2d 449 (D.C. Cir. 1953).

⁵⁴ *Sellas v. Kirk*, 200 F.2d 217 (9th Cir. 1952).

⁵⁵ 1952 Annual Surv. Am. L. 120, 28 N.Y.U.L. Rev. 118.

⁵⁶ 332 U.S. 490 (1947).

⁵⁷ On reviewability of agency action, see *Anthony v. NLRB*, 204 F.2d 832 (6th Cir. 1953); *Houlihan v. NLRB*, 201 F.2d 187 (D.C. Cir. 1952) (nonissuance of complaint); *United Gas Pipe Line Co. v. FPC*, 203 F.2d 78 (5th Cir. 1953) (nonissuance of declaratory order); *McTernan v. Rodgers*, 113 F. Supp. 638 (N.D. Cal. 1953) (investigatory proceedings).

Cases of interest involving the exhaustion-of-administrative-remedies doctrine include *Bruce v. Stillwell*, 206 F.2d 554 (5th Cir. 1953); *Capital Transit Co. v. Safeway Trails*, 201 F.2d 708 (D.C. Cir. 1953); *Smith v. United States*, 199 F.2d 377 (1st Cir. 1952); *Jonco Aircraft Corp. v. Franklin*, 114 F. Supp. 392 (N.D. Tex. 1953); *Avina v. Brownell*, 112 F. Supp. 15 (S.D. Tex. 1953); *Group v. Finletter*, 108 F. Supp. 327 (D.D.C. 1952); *Morgan v. United States*, 107 F. Supp. 501 (W.D. Ky. 1952); *Los Angeles v. Department of Social Welfare*, 250 P.2d 708 (Cal. App. 1952); *Baldwin Const. Co. v. County Board*, 24 N.J. Super. 252, 93 A.2d 800 (Law Div. 1953).

Scope of Review.—A decision by the Court of Appeals for the Fourth Circuit contains an interesting discussion of the difference between review of a lower court sitting without a jury and review of an administrative order. The basic difference, reads the opinion of Chief Judge Parker,

is that in the former case [appellate courts] are given power to review the facts, whereas, in the latter, [their] power is limited to setting aside the findings of the agency if not supported by substantial evidence. In the one case [they] review the facts, in the other the sufficiency of the evidence to sustain the agency's findings. If Congress had intended to give a power of review similar to that on appeals in equity, it knew perfectly well how to do so, as shown by the provision for review of Tax Court decisions. . . . The proposition was fully considered and was rejected because the effect of its adoption would have been to destroy the unified administration attained by the creation of a single agency and to make of the eleven courts of appeals eleven super agencies.⁵⁸

Nor, according to Judge Parker, does the provision in the Administrative Procedure Act that review is to be of the "whole record" provide for review of the facts as in equity or anything analogous to such review.

There is no real difference between the function of the court as outlined in the [APA] and its function under the rule that a verdict should not be allowed to stand against a motion for judgment n. o. v. unless supported by evidence which a reasonable mind might accept as adequate to support a conclusion, or the rule that a verdict should be directed where the evidence is all one way or so nearly one way that reasonable men could not doubt what the facts are. In either case, the duty is not one of finding the facts but of appraising the evidence and of determining whether it furnishes a substantial basis for the finding of fact sought to be predicated thereon.⁵⁹

A different view is taken by Judge Soper, who delivered a concurring opinion. According to him, under the APA, review of an agency is now analogous to review of a lower court in a nonjury case. It is difficult, he asserts,

to draw the line between the function of an appellate court in passing upon the decision of a trial judge sitting without a jury in an action at law or in a suit in equity, on the one hand, and the function of the court in reviewing the decision of an administrative tribunal on the other. The decision of a trial court must be sustained in any case unless it is clearly erroneous, and its greater opportunity to learn the truth based upon its more intimate contact with the case must be respected. In like manner the conclusions of the administrative body and its expertness may not be lightly set aside; but they too may not be given effect if they are so erroneous or so unjust as to shock the conscience of the court.

⁵⁸ *NLRB v. Southland Mfg. Co.*, 201 F.2d 244, 246 (4th Cir. 1952).

⁵⁹ *Id.* at 248.

The mental processes of the reviewing authority which are called into action in each situation are so similar that they can hardly be distinguished.⁶⁰

The difference of view between Judges Parker and Soper is of great significance, for the view that prevails will largely determine the extent to which review has been broadened under the APA. If Judge Soper is correct, then review has, indeed, been widened by the 1946 Act. And, from the point of view of the logical systematization of the law, it would seem to be desirable for review of agencies to be assimilated to review of lower courts. If the ultimate development of our administrative law is to be the judicialization of our administrative agencies, much as the executive tribunals of pre-Commonwealth England were judicialized and fitted into their place in the existing legal order, then the approach asserted by Judge Soper is a necessary step in the judicialization process. It should be noted that the problem dealt with by the fourth circuit in the case under discussion is in no way resolved by the now-famous *Universal Camera* case.⁶¹ It held only that review under the APA was to be somewhat broader than it had heretofore been. But it did not tell us how much broader review was to be. That has been left for the lower federal courts to work out.⁶²

Review of Expertise.—*FCC v. RCA Communications*⁶³ involved review of an order granting an application for modification of a radio-telegraph carrier license so as to permit the carrier to maintain direct radio-telegraph circuits between the United States and certain foreign countries in competition with another carrier's existing radio-telegraph facilities. The Commission, in reaching its conclusion that duplicating authorizations were in the public interest where competition was reasonably feasible, had relied upon what it felt was a national policy in favor of free competition. In its view, the maintenance of competition was in itself a sufficient goal of federal communications policy so as to make it in the public interest to authorize a license merely because competition was reasonably feasible.

In his opinion, Mr. Justice Frankfurter places emphasis upon the fact that the Commission did not rely upon its own experience in concluding that competition here was desirable. It seems to have relied almost entirely on its interpretation of national policy. Since the Com-

⁶⁰ Id. at 250.

⁶¹ *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951), discussed in 1951 Annual Surv. Am. L. 148.

⁶² Other cases dealing with the effect of the "whole record" requirement of the APA and Taft-Hartley Act upon the scope of review include *NLRB v. Stafford*, 205 F.2d 19 (8th Cir. 1953); *NLRB v. San Diego Gas & Elec. Co.*, 205 F.2d 471 (9th Cir. 1953); *NLRB v. Nina Dye Works*, 203 F.2d 849 (3d Cir. 1953); *NLRB v. Brown & Root, Inc.*, 203 F.2d 139 (8th Cir. 1953); *NLRB v. Dinion Coil Co.*, 201 F.2d 484 (2d Cir. 1952).

⁶³ 346 U.S. 86 (1953).

mission professed to dispose of the case merely upon its view of a principle which it derived from the statute, and did not base its conclusion on matters within its own special competence, the opinion goes on, it is for the Court to determine what the governing principle is. And, says the Court, it is no longer true that there is an unqualified national policy favoring competition. It is therefore improper for the FCC to suppose that the standard it has adopted is to be derived without more from a national policy defined by legislation and by the courts. On the other hand, had the Commission clearly indicated that it relied on its own evaluation of the needs of the industry rather than on what it deemed a national policy, its order would have a different foundation. The case must consequently be remanded to the Commission for its reconsideration.

The instant decision is in many ways comparable to the celebrated first *Chenery* case.⁶⁴ There, too, the Court, through Mr. Justice Frankfurter, found that the agency action was based on an incorrect assessment of what the agency thought to be an established legal principle, rather than on its own expertise. And the case was remanded to the agency for a decision based on its special administrative competence. The only difficulty with this sort of thing is that it involves needless duplication of both the administrative and judicial processes. In *Chenery* the agency took the hint extended by the Court and reissued its original decision, but, this time, expressly relied upon its expertise to support its conclusions.⁶⁵ And it seems reasonably certain that the same thing will happen upon remand in the instant case. There would certainly appear to be a better way of handling these cases, which, at best, take an unconscionably long time, than by marching them twice through the agencies and the courts. Truly, as Mr. Justice Frankfurter himself aptly expressed it, "this danger if not likelihood of thus marching the king's men up the hill and then marching them down again seems to me a mode of judicial administration to which I cannot yield concurrence."⁶⁶

Constitutional Fact.—The ghost of *Ohio Valley Water Co. v. Ben Avon Borough*,⁶⁷ supposedly laid to rest over a decade ago, continues still to haunt litigants and judges in the federal courts. In *Baltimore & Ohio R.R. v. United States*⁶⁸ the appellant railroads brought suit in the district court to set aside an ICC rate order, which prescribed maximum carload rates for carrying certain kinds of fresh vegetables. The rates were charged to be "confiscatory" and therefore in violation of the due process clause. The basis for this charge was an allegation that

⁶⁴ SEC v. *Chenery Corp.*, 318 U.S. 80 (1943).

⁶⁵ See SEC v. *Chenery Corp.*, 332 U.S. 194 (1947).

⁶⁶ Dissenting, in *City of Yonkers v. United States*, 320 U.S. 685, 694 (1944).

⁶⁷ 253 U.S. 287 (1920).

⁶⁸ 345 U.S. 146 (1953).

if put in effect the rates would produce less money than it would cost the railroads to carry the particular vegetables covered by each rate. The majority of the Court held, however, that so long as rates as a whole afford railroads just compensation for their overall services to the public the due process clause should not be construed as a bar to the fixing of noncompensatory rates for carrying some commodities when the public interest is thereby served.

In the dissenting opinion of Mr. Justice Douglas, there is a clear implication that there may still be room for the *Ben Avon* approach in the federal courts. According to the dissent, litigants are entitled to rely on the rule of *Baltimore & Ohio R.R. v. United States*⁶⁹ until and unless it is overruled. That case held that a carrier was entitled to raise the issue of confiscation upon review of an ICC order, even though it had not tendered the issue in the hearings before the Commission but only on a petition for reconsideration after the order was issued. The district court therefore erred when it ruled that evidence bearing on the issue of confiscation was inadmissible on review because it had not been tendered in the hearings before the Commission. And, says Mr. Justice Douglas, though the Court does not expressly decide that issue, its opinion assumes that the tender of proof on the issue of confiscation was timely.

If Mr. Justice Douglas is correct, what is this case but a revival, in new guise, of the *Ben Avon* doctrine? If evidence upon the confiscation issue is admissible in the review proceeding, it means that the court must decide that issue *de novo* on its independent judgment, for, since the issue was not raised at the agency hearings, the court cannot limit its decision on the issue to review of an administrative finding upon it. It is to be regretted that the opinion of the Court did not even see fit to touch upon this important question. Certainly, the time is ripe for a clear indication by the highest tribunal of just where *Ben Avon* and the implications flowing from it stand today.⁷⁰

Public Tort Liability.—*Dalehite v. United States*⁷¹ indicates that the doctrine of sovereign immunity is still a most important one despite its supposed elimination by the Federal Tort Claims Act of 1946. The *Dalehite* case involved an action against the United States for the death of plaintiff's husband and father, respectively, as the result of an explosion of ammonium nitrate fertilizer stored in vessels in a Texas harbor.

⁶⁹ 298 U.S. 349 (1936).

⁷⁰ On the related doctrine of "jurisdictional fact," see *NLRB v. Pappas & Co.*, 203 F.2d 569 (9th Cir. 1953); *O'Leary v. Dielschneider*, 204 F.2d 810 (9th Cir. 1953). On review of mixed findings of law and fact, *Robinson v. Bradshaw*, 206 F.2d 435 (D.C. Cir. 1953); *NLRB v. Bemis Bag Co.*, 206 F.2d 33 (5th Cir. 1953); *NLRB v. American Dist. Tel. Co.*, 205 F.2d 86 (3d Cir. 1953); *NLRB v. Howell Chevrolet Co.*, 204 F.2d 79 (9th Cir. 1953). Compare *American Broadcasting Co. v. United States*, 110 F. Supp. 374 (S.D.N.Y. 1953).

⁷¹ 346 U.S. 15 (1953).

The fertilizer was produced by the Government and was loaded aboard a French vessel to be transported to Europe as part of a government program to ease the shortage of fertilizer abroad. The action was based on the Tort Claims Act, plaintiffs relying on the Government's participation in the manufacture and transportation of a dangerous material and alleging negligence on the part of the federal officials and employees involved in the production and transportation of the material.

The Supreme Court, in a four-to-three decision, held that the United States was not liable. The Tort Claims Act expressly excepts from its operation acts or omissions of government officers exercising due care in carrying out statutes or regulations, whether they be valid or not, and acts of discretion by government employees in the performance of their duties whether or not the discretion involved be abused. The present case, said the Court, involved the exercise of discretionary authority. And, in such a case, it makes no difference whether there was negligence or not. The exercise of discretion could not be abused without negligence or a wrongful act. The exception in the statute applies whenever the act causing damage involves the discretion of the executive or the administrator to act according to one's judgment of the best course. And it seeks to preclude actions for abuse of discretionary authority whether or not negligence is alleged to have been involved.⁷²

Even if one agrees that the exception in the Tort Claims Act of discretionary acts is well taken, it does not follow that the United States should not be liable in the instant case. As the dissenting justices point out, it seems unjust, as a starting point, that the damage should fall entirely on the innocent victims of this man-made disaster. The disaster was caused by forces set in motion by the Government, completely controlled or controllable by it. Its causative factors were wholly beyond the knowledge or control of the victims. Yet it is they alone who must bear the burden of damage to which they were utterly incapable of contributing.

It is one thing, say the dissenters, to hold that the Act's exemption applies to decisions taken at Cabinet level or at other important levels of the administrative hierarchy. It is, however, quite another thing to say that the Act intends to exempt negligent acts, no matter by whom performed, provided they are done pursuant to an original discretionary decision made by one vested with policy-determining functions. The Government's negligence here, concludes the dissenting opinion, was not in policy decisions of a regulatory or governmental nature, but involved actions akin to those of a private manufacturer, contractor, or

⁷² See, similarly, *Hernandez v. United States*, 112 F. Supp. 369 (D. Hawaii 1953); *Western Mercantile Co. v. United States*, 111 F. Supp. 799 (W.D. Mo. 1953). See also *Taylor v. Gotsfelty*, 201 F.2d 51 (6th Cir. 1952) (officer not personally liable where discretion involved).

shipper. In such circumstances, the Government should be held liable on the same basis as a private individual would be. "Surely a statute so long debated," asserts Mr. Justice Jackson, "was meant to embrace more than traffic accidents. If not, the ancient and discredited doctrine that 'The King can do no wrong' has not been uprooted; it has been amended to read, 'The King can do only little wrongs.'" ⁷³

Under a decision like that in the *Dalehite* case, the exception in the Tort Claims Act of acts done pursuant to statute or regulation and those involving discretion tends largely to swallow the waiver of immunity made by the Act. If one bears in mind the types of cases in which private individuals are damaged by acts of the administration, one will realize that the Government still enjoys immunity for the most important kinds of administrative action. Only where the officer whose act has caused the injury has been negligent, in circumstances in which a private employer would be liable if the officer were his employee, is the Government liable under the federal law. In the absence of negligence the Government is still not liable, provided only that the act causing the damage was done in execution of a statute or regulation or that the administrative function at issue involved the exercise of discretionary authority. And it matters little that the law or regulation itself is invalid or that the delegated discretionary power has been abused.

This exception has the effect of leaving the Government irresponsible in most cases in which the act causing the damage is not committed by a negligent public officer, for it is only in the rare case that the officer has not acted in the execution of a statute or regulation or in the exercise of his discretionary powers. And if discretionary powers are involved, the *Dalehite* case shows that recovery against the State cannot be had even though the act causing the damage were done negligently.

It is particularly important to note that the exception under consideration has the effect of leaving the private individual without a remedy under the Tort Claims Act where he has suffered damage from an illegal administrative act. Even if the act causing the injury were *ultra vires*, the exception to the principle of government liability is operative, provided only that the act was performed in application of a statute or regulation or in the exercise of a discretionary power.

It has been asserted by one commentator that the exceptions contained in the Federal Tort Claims Act are "for the most part well taken." ⁷⁴ American observers tend to feel that there must be some limitations on the tort liability of the State. If the State were to be put on the same level as the private citizen, the strain on the public treasury might, it has been feared, prove very great. "Realistically speaking," an American judge has stated, "the state should be free from the vexa-

⁷³ 346 U.S. 15, 60 (1953).

⁷⁴ Comment, 56 Yale L.J. 534, 561 (1947).

tious suits based on fictitious grounds which might spring into abundance were the immunity removed."⁷⁵

Britain, which is certainly as solicitous about drains on the public fisc as we are in this country, has seen fit, in the Crown Proceedings Act, 1947, to enact a general principle of state liability in tort without the many exceptions contained in the American Tort Claims Act; and this fact suggests that the dangers involved in complete abandonment of the doctrine of sovereign immunity are not so great as many Americans have feared. Even more important, perhaps, is the fact that in France a system of general state responsibility has been able to function effectively for half a century.⁷⁶ The doctrine of sovereign immunity, as the American judge just quoted has remarked, "cannot be defended in any case on ethical grounds."⁷⁷ If it can be justified at all, it is only because it is felt to be unwise for practical reasons to abandon it and open the public purse to all who may have claims against the State. The British and French experience proves, however, that the danger referred to is not great enough to justify a doctrine completely indefensible on ethical grounds. Certainly, as a judge of one of our state courts recently declared: "The reasoning which supports the doctrine of sovereign immunity in cases of this character is so fallacious and unsound that it should shock the intelligence, as well as the sense of justice, of those who believe in the American way of life. In my opinion, decisions of this kind are not only productive of widespread disrespect for the law and courts but can be used as the basis for propaganda which affects the stability of our government."⁷⁸

⁷⁵ Wolfe, J., concurring in *Niblock v. Salt Lake City*, 100 Utah 573, 583, 111 P.2d 800, 804 (1941).

⁷⁶ See Schwartz, *French Administrative Law and the Common-Law World*, c. 9 (to be published in January 1954).

⁷⁷ Wolfe, J., concurring in *Niblock v. Salt Lake City*, 100 Utah 573, 582, 111 P.2d 800, 804 (1941).

⁷⁸ Carter, J., dissenting in *Madison v. San Francisco*, 106 Cal. App.2d 232, 236 P.2d 141 (1951).

Among the significant cases not discussed because of space limitations are:

Enforcement of subpoenas: *Tobin v. Banks & Rumbaugh*, 201 F.2d 223 (5th Cir. 1953); *Mines and Metals Corp. v. SEC*, 200 F.2d 317 (9th Cir. 1952) (rule of *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501 [1943] and *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186 [1946] not changed by APA).

Res judicata: *American Air Transport v. CAB*, 206 F.2d 423 (D.C. Cir. 1953); *Niagara Mohawk Power Co. v. FPC*, 202 F.2d 190 (D.C. Cir. 1952).

The literature during the year included: *Street, Governmental Liability* (1953); *Fuchs, Judicial Control of Administrative Agencies in Indiana*, 28 Ind. L.J. 293 (1953); *Grundstein, Law and the Morality of Administration*, 21 Geo. Wash. L. Rev. 265 (1953); *Newman, Should Official Advice Be Reliable? Proposals as to Estoppel and Related Doctrines in Administrative Law*, 53 Col. L. Rev. 374 (1953); *Schwartz, Primary Administrative Jurisdiction and the Exhaustion of Litigants*, 41 Geo. L.J. 495 (1953); *Schwartz, A Decade of Administrative Law: 1942-51*, 51 Mich. L. Rev. 775 (1953); *Schwartz, Administrative Procedure and Natural Law*, 28 Notre Dame Law. 169 (1953); *Schwartz, The Model State Administrative Procedure Act—Analysis and Critique*, 7 Rutgers L. Rev. 431 (1953).

MILITARY LAW

JOHN V. THORNTON

AT THE height of World War II courts-martial processed about one-third of all criminal cases involving United States nationals, and even today military tribunals handle approximately one-ninth of such cases, or something like 250,000 prosecutions a year.¹ The work load is particularly heavy at the top of the military justice structure. Each judge of the Court of Military Appeals, for example, turns out on the average about seventy-five opinions a year compared to the ten or fifteen majority opinions written by a justice of the United States Supreme Court.

Despite its very heavy case load,² the Court of Military Appeals—the “Supreme Court” of the military legal system—continues to do an outstanding job in striking the delicate balance between the ideals of justice and the needs of discipline. Indeed one wonders why Congress has not yet granted the three judges of the court, like other federal judges, life tenure instead of their present five, ten and fifteen year terms. Any trial period which the legislative body may possibly have intended has passed, and the court, as well as each member thereof, has come through with flying colors.

This article analyzes recent decisional additions to the revamped structure of military law which is being built day by day under the new Uniform Code of Military Justice, effective since May 31, 1951. The boards of review, the Judge Advocates General, and many others make important contributions to this structure, of course, but space permits reference only to the roles played by the Court of Military Appeals and the federal civil courts. Moreover, since it is directed mainly to a civilian audience, the article emphasizes broad trends and does not deal with highly technical points which concern only the military law specialist.

I

MILITARY JURISDICTION

In *Burns v. Wilson*³ the United States Supreme Court considered, for the first time since the Uniform Code became effective, the extent

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¹ Latimer, *Military Justice*, 3 Cath. U. L. Rev. 73 (1953).

² Up to Sept. 19, 1953, two years after the court heard its first argument, it had docketed 3,719 cases. This figure includes petitions seeking a grant of review of which the court grants about 15 per cent. As of that same date new cases were being filed at the rate of about 200 a month.

³ 346 U.S. 137 (1953). The lower court's decision was discussed in 1952 Annual

of review by civil courts of decisions of courts-martial.⁴ Two airmen claimed in a habeas corpus proceeding that the military had deprived them of due process of law by trying them in an atmosphere of vengeance and perjured testimony and on the basis of coerced confessions. The late Chief Justice Vinson, with whom Justices Reed, Burton, and Clark agreed, pointed out that the scope of review on military habeas corpus is narrower than that in civil cases, but held that the constitutional guarantee of due process has at least some application to it. Since it is by no means clear that such was previously the law,⁵ the decision is significant and represents a slight modification in the Supreme Court's prior tendency to keep the inquiry on military habeas corpus strictly to "jurisdiction" in the narrow and traditional sense.⁶

To what extent does due process apply? The answer of *Burns* is vague, perhaps necessarily so: ". . . due process is meaningful enough, and sufficiently adaptable, to protect soldiers—as well as civilians—from the crude injustices of a trial so conducted that it becomes bent on fixing guilt by dispensing with rudimentary fairness. . . ." ⁷ However, since the military courts had given "fair consideration" to petitioners' claims of due process violations, there was no need for a further hearing by the civil judiciary.

Surv. Am. L. 133, 28 N.Y.U.L. Rev. 131 (1953); 21 Geo. Wash. L. Rev. 492 (1953). Interesting on the question of jurisdiction of courts of inquiry is *United States v. Shibley*, 112 F. Supp. 734 (S.D. Cal. 1953).

⁴ While the case arose under the Articles of War, the decision therein, as Mr. Justice Frankfurter pointed out, "necessarily will have a strong bearing upon the relations of the civil courts to the new Court of Military Appeals." 346 U.S. 137, 150 (1953). In fact the Court's opinion makes extensive references to the Uniform Code and recent reforms in military justice.

⁵ In a concurring opinion in the Supreme Court shortly after the Civil War, it was argued by Chief Justice Chase and three of his colleagues that "the power of Congress, in the government of the land and naval forces and of the militia, is not at all affected by the fifth or any other amendment." *Ex parte Milligan*, 4 Wall. 2, 138 (U.S. 1866). But see the diametrically opposite view of Chief Judge Quinn dissenting in *United States v. Sutton*, 3 USCA 220, 11 CMR 220 (1953). Some authorities seem to have assumed that decisions of the Supreme Court prior to the *Burns* case ruled out any due process test in military habeas corpus. See, e.g., Pasley, *Federal Courts Look at the Court-Martial*, 12 U. of Pitt. L. Rev. 7, 32, 33 (1950); Re, *The Uniform Code of Military Justice*, 25 St. John's L. Rev. 155, 166-67 (1951).

The present writer has argued that review in military habeas corpus should include due process questions to the same extent as in civil cases. Meriam & Thornton, *Double Jeopardy and the Court-Martial*, 19 Brooklyn L. Rev. 62 (1952); McNiece & Thornton, *Military Law from Pearl Harbor to Korea*, 22 Ford. L. Rev. 154, 171-76 (1953). The dissent by Justices Douglas and Black in *Burns v. Wilson* seems to take that view. It has also been suggested that the same standards as in civilian cases should govern where the military prisoner has been convicted of a "criminal" offense but a different standard where he has been convicted of a "disciplinary" offense. Comment, *Due Process in Criminal Courts Martial*, 20 U. of Chi. L. Rev. 700 (1953).

⁶ Representative of the earlier attitude are *Ex parte Quirin*, 317 U.S. 1, 40 (1942); *Humphrey v. Smith*, 336 U.S. 695 (1949); *Hiatt v. Brown*, 339 U.S. 103 (1950); *Johnson v. Eisentrager*, 339 U.S. 763, 783 (1950).

⁷ 346 U.S. 137, 142 (1953).

Mr. Justice Jackson concurred in the result in *Burns* without opinion. Mr. Justice Minton, likewise concurring, thought that the review should not extend to due process issues. Mr. Justice Frankfurter, not voting, felt that, "The right to invoke habeas corpus to secure freedom is not to be confined by any *a priori* or technical notions of 'jurisdiction,'" and, "if imprisonment is the result of a denial of due process, it may be challenged no matter under what authority of Government it was brought about."⁸ Finally, Mr. Justice Douglas, dissenting with Mr. Justice Black, stated that all the relevant provisions of the Fifth Amendment apply to military trials, and that civil review "is not limited to questions of 'jurisdiction' in the historic sense."⁹ Thus, the entire Court, with the exception of Mr. Justice Minton and possibly Mr. Justice Jackson, gave some play to considerations of due process.

Another habeas corpus proceeding received a great deal of newspaper and other publicity.¹⁰ It construed a newcomer to military law, Article 3(a) of the Uniform Code, which in substance provides that one who commits, while subject to military jurisdiction, an offense punishable by confinement of five years or more remains subject to that jurisdiction, despite termination of his military status, if he cannot be tried in the courts of the United States.¹¹ Article 3(a) was in large part designed to overrule the *Hirshberg* case which held that a serviceman could not be tried by court-martial after he received an honorable discharge.¹²

In the instant case one Toth, a civilian and Korean veteran, was arrested in Pittsburgh by Air Force police and transported to Korea on a charge of having committed murder there. The district court held, speaking of Article 3(a),

There is no provision of law granting to members of the military police the power or authority to arrest a civilian, even for the purpose of implementing the above-mentioned limited jurisdiction. . . .

It is a grave matter for military police to arrest a civilian and remove him for trial forthwith, without a hearing, to a distant point . . . when there is no provision in any statute authorizing this to be done. . . .¹³

⁸ Id. at 148-49. On a petition for rehearing which was denied in 74 Sup. Ct. 3 (1953), Mr. Justice Frankfurter, in a well-considered opinion, urged strongly that the Court should pass squarely upon the questions whether the scope of review in military habeas corpus is narrower than in civil cases and whether an American citizen detained outside of any federal judicial district may maintain habeas corpus.

⁹ Id. at 152.

¹⁰ *Toth v. Talbott*, 113 F. Supp. 330 (D.D.C. 1953). The substance of a second opinion in the case appears in N.Y. Times, Sept. 4, 1953, p. 3, col. 6. Major Bertram Schwartz comments on the decision in a letter to the N.Y. Times, July 1, 1953, p. 28, col. 6.

¹¹ 64 Stat. 109 (1950), 50 U.S.C. § 553(a) (Supp. 1952).

¹² United States ex rel. *Hirshberg v. Cooke*, 336 U.S. 210 (1949). The offense there was maltreatment of fellow prisoners of war.

¹³ *Toth v. Talbott*, 113 F. Supp. 330, 331 (D.D.C. 1953).

The court thereupon directed the Air Force to return Toth from Korea and discharged him from military custody.

There is great doubt as to the correctness of this ruling. Nevertheless, the public uproar caused by the case raises doubts as to the wisdom of permitting military jurisdiction in such situations. The public distrusts sudden exercises of military power over civilians. To avoid miscarriages of justice, a statute like Article 3(a) is a necessity, but granting jurisdiction to implement the Article to the federal district courts rather than to military tribunals might be a wise expedient.¹⁴ This is not said because of any lack of confidence in military courts. It simply may offer one way out of what is likely to prove a continuing sore point in military-civilian relations. Some administrative difficulties undoubtedly argue against conferring jurisdiction upon civilian courts, especially where the offense has been committed overseas, but these are not insuperable.

The Court of Military Appeals was faced with what looked like another *Hirshberg* case in *United States v. Solinsky*,¹⁵ but it managed to sustain military jurisdiction, Chief Judge Quinn dissenting. Article 3(a) of the Uniform Code, discussed above, had no application because the crimes involved were committed prior to the Code's effective date. The accused had been honorably discharged subsequent to commission of the offenses, and, just as in *Hirshberg*, had re-enlisted the day after his discharge. The court decided, however, that the *Hirshberg* doctrine did not apply because accused here had been discharged prior to the fixed term of his enlistment upon the express condition of re-enlisting for an indefinite period. Under such circumstances he had not terminated his military service. The case is a very close one, legally speaking, but policy considerations would seem to favor the majority's view.

The same bench ruled several times on the question whether an accused had been lawfully inducted and was thus amenable to military jurisdiction,¹⁶ but the decisions are of no great importance for present

¹⁴ General Green, then Judge Advocate General of the Army, said concerning the proposed Article 3(a) when the Uniform Code was before Congress: "I believe this is unnecessary and the inevitable result will be public revulsion against its exercise. . . . [N]o matter how just and fair the system of military justice may be, if it reaches out to the civilian community, every conceivable emotional attack is concentrated on the system I merely suggest that you confer jurisdiction upon Federal courts to try any person for an offense denounced by the code if he is no longer subject thereto." *Hearings before Committee on Armed Services on S. 857 and H.R. 4080, 81st Cong., 1st Sess. 1, 256 (1949)*. See also *Notes*, 21 *Geo. Wash. L. Rev.* 711, 728-30 (1953); 21 *U. of Kan. City L. Rev.* 95, 101 (1952).

¹⁵ 7 *CMR* 29 (1953). Somewhat analogous problems arose in *United States v. Downs*, 3 *USCMA* 90, 11 *CMR* 90 (1953) and *United States v. Klunk*, 3 *USCMA* 92, 11 *CMR* 92 (1953).

¹⁶ *United States v. Ornelas*, 2 *USCMA* 96, 6 *CMR* 96 (1952), 41 *Geo. L.J.* 428 (1953); *United States v. Rodriguez*, 6 *CMR* 101 (1952); *United States v. McNeill*, 2 *USCMA* 383, 9 *CMR* 13 (1953). *United States v. Weiman*, 3 *USCMA* 216, 11 *CMR* 216

purposes. A holding of some consequence was to the effect that an accused's escape from confinement did not terminate the jurisdiction of a court-martial even in a capital case; it could try and sentence him *in absentia*.¹⁷ Most civilian courts do not permit that procedure in capital cases, but persuasive reasons, such as the mobility of military personnel and the likely unavailability of witnesses if trials are long postponed, argue for a different rule in military law.

II

INSTRUCTIONS TO MEMBERS OF COURTS-MARTIAL

It is sometimes assumed that the judges of the Court of Military Appeals are very much divided in their views. Actually this is not so, at least in most areas of the law. Of the 367 cases in which opinions were published up to September 4, 1953, there was measurable disagreement in just a little over 20 per cent and in only thirty-six cases were outright dissents filed. This is a much greater approach to unanimity than the opinions of the United States Supreme Court reflect.

Be that as it may, it is true that the court is split over the solution to certain basic problems. Rarely does disagreement relate to substantive criminal law; it pertains rather to the role of the court and other instrumentalities in the implementation of the Uniform Code. All the judges agree that the Code was designed to accomplish certain reforms. They do not, however, see eye to eye on the specific things which should be done to accomplish those reforms, and do not hesitate to express their views (as well as their opinions concerning colleagues' views) in rather plain language. This is as it should be. It is better that divergent theories be aired now than left to plague the future. Unhampered by precedent and far freer than most tribunals, the Court of Military Appeals has the opportunity to formulate sound principles by drawing from the best of modern legal thought. It cannot exploit this opportunity to best advantage without full interchange of ideas among the judges.

One big area of disagreement concerns instructions. The Uniform Code, unlike prior military law, requires in Article 51(c) that the law officer (judge) instruct the members of the court-martial (jury) in open

(1953) held that the military had jurisdiction over Polish nationals who were retainers to the camp of American troops in France. A number of cases decided that a court-martial was not deprived of jurisdiction merely because the orders appointing a member were in slightly inaccurate form. *United States v. Beard*, 2 USCMA 344, 8 CMR 144 (1953); *United States v. Swaim*, 2 USCMA 347, 8 CMR 147 (1953); *United States v. Lawrence*, 2 USCMA 348, 8 CMR 148 (1953); *United States v. Lee*, 3 USCMA 109, 11 CMR 109 (1953). The court quite properly found it unnecessary that the appropriate form of order "be followed parrot-like in minute detail" and refused to allow "matters of sheer form" to take precedence "over those of substance." *United States v. Beard*, *supra*.

¹⁷ *United States v. Houghtaling*, No. 573, USCMA (1953), 66 Harv. L. Rev. 1538.

session as to the elements of the offense. As might be expected, the largest single category of cases before the Court of Military Appeals last year involved instructional error.

It was clear from the court's early decisions that the law officer, even without request, had to instruct on the offenses charged and lesser included offenses and defenses in issue.¹⁸ This year's decisions have dealt with refinements and modifications of these basic rules, and attention may first be directed to leading cases in which divergent views have been expressed by one or more of the judges.

In *United States v. Smith*¹⁹ defense counsel spelled out in his closing argument the elements of larceny. Thereupon the law officer said that he was going "to eliminate any prolonged discussion as to the necessary elements of proof" since the "portions of the Manual for Courts-Martial 1949 and 1951 as were read by defense counsel correctly state the elements." The law officer also referred the court to paragraphs of the Manual and defense counsel stated that the "law officer has adequately covered the instructions." The court decided that the defense by thus "clearly and unequivocally" assenting to "minimal instructions" had waived any error. Chief Judge Quinn was "not willing to see court-martial trials become a game where the sly defense counsel can acquiesce in erroneous instructions merely to build a record for obtaining reversal on appeal," and Judge Latimer, concurring, felt that the court was justified in placing "some responsibility on defending counsel."

In a vigorous dissent Judge Brosman urged that accused persons should not be held completely accountable for the conduct of assigned military counsel, "young in years, junior in military grade, and without substantial professional experience in the civilian community."²⁰ He also pointed out that in special court-martial cases assigned counsel frequently are not lawyers. At least until the provisions and practices of the Uniform Code have become fully settled and accepted, Judge Brosman contended, the law officer should carry the "major burden of guaranteeing that justice is done at the trial level in all cases." In his view, since the Code and Manual require the *law officer* to instruct, the instruction in question was insufficient in incorporating by reference comments of defense counsel.

In a premeditated murder case the court held that it was not error,

¹⁸ See the cases collected in 1952 Annual Surv. Am. L. 142-46, 28 N.Y.U.L. Rev. 140-44 (1953); 6 Vand. L. Rev. 412 (1953).

¹⁹ 2 USCMA 440, 9 CMR 70 (1953).

²⁰ In *United States v. Mundy*, 2 USCMA 500, 9 CMR 130 (1953), Judge Brosman was willing to agree with his brothers that there had been a waiver where defense counsel's aid was sought in framing instructions and defense counsel replied that he would leave it up to the law officer and would consent to the law officer's ruling, doing this apparently as a matter of trial tactics.

in the absence of a request, for the law officer to fail to define "words of general usage" like "malice aforethought" and "premeditation."²¹ Again the majority stressed the theme: "Defense counsel can not sit by, do nothing to assist his client, and then have this Court reverse because of his delict. The sooner defense counsel defend properly the rights of the accused, the sooner we will have good administration." The court also ruled that the failure to instruct specifically on unpremeditated murder was cured by the law officer's instruction on premeditated murder and his statement that unpremeditated murder was a lesser included offense, particularly in view of the arguments addressed to the court by trial and defense counsel on this point. In a separate opinion Judge Brosman denied that "malice aforethought" and "premeditation" were self-defining terms but agreed that it was not error here to fail to explain them since the burden of requesting clarification rested upon defense counsel. He also disassociated himself from the majority's "gratuitous attack" on defense counsel and refused to accept the "completely untenable notion" that "within each proper instruction on premeditated murder there is included an adequate instruction on the unpremeditated offense." The court's decision represented, in his view, "a further instance in what appears to be a series of recent steps—retrogressive ones, I am sure—away from our early, sound and strong position in the sphere of instructions."²²

Judge Brosman's unwillingness to accept the comments of counsel as a substitute for instructions by the law officer is evident also from other decisions. In one involuntary manslaughter case the law officer did not explain "culpable" negligence, and the majority found that he had no duty to do so, especially since it "was carefully and correctly defined by counsel in closing arguments."²³ Judge Brosman agreed that there was no need, in the absence of a request, for the law officer to clarify the meaning of the term, but he could not "possibly understand" the suggestion that the fact that counsel had defined it was relevant. If there is any obligation to instruct, the members of the court-martial must, as he sees it, "take their law from no court agency save the forum's 'judge,' the law officer." In yet another case Judge Brosman in dissent reiterated the same thought.²⁴

²¹ United States v. Day, 2 USCMA 416, 9 CMR 46 (1953).

²² As represented by United States v. Clay, 1 USCMA 74, 1 CMR 74 (1951), which first laid down the concept of "military due process." A similar cleavage between the majority and Judge Brosman is evident in United States v. Sechler, 3 USCMA 363, 12 CMR 119 (1953), also involving the question of the need to define unpremeditated murder.

²³ United States v. Cobb, 2 USCMA 339, 8 CMR 139 (1953).

²⁴ United States v. Glover, 7 CMR 40, 45 (1953). This case also illustrates Judge Brosman's reluctance to regard a failure to instruct on a lesser included offense as non-prejudicial. To the same effect is United States v. Estes, No. 773, USCMA (1953). Cf. United States v. Bryant, No. 1491, USCMA (1953).

It is not, however, Judge Brosman who is always in the minority in these borderline instruction cases. In one decision involving a charge of burglary and assault with intent to commit rape, a court-martial in Korea found accused guilty of unlawful entry and indecent assault.²⁵ The majority found prejudicial error in the failure to instruct on these latter offenses which it regarded as reasonably raised by the evidence and additional error in the failure to instruct on voluntary intoxication as bearing on the specific intent required for indecent assault. Chief Judge Quinn, in what is probably the most vehement dissent ever registered by a judge of the court, took his colleagues sharply to task, saying:

The fact that the court [martial] found accused guilty of the lesser included offense of indecent assault doesn't really indicate that the evidence pointed to anything but the greater offense. . . . To be realistic about it, the court was just giving the accused "a break."

Having got that "break" from the court-martial, the majority now "compounds the felony" by . . . ordering a rehearing which to all intents and purposes will be equivalent to a finding of not guilty, because the witnesses can never be produced again at a trial, and the process of retrying "on the record" is a dubious one to say the least.

This, then is not substantial justice. It is just the antithesis of it. It is defeating justice by the over-emphasis of pure technicality.

Our public relations with a friendly neighbor is severely strained by the public knowledge that a fiendish crime can be perpetrated by an American soldier on an innocent victim and appropriate punishment of such an offender compromised and defeated by the unbelievable technicalities and meanderings of this Court.²⁶

Even Judge Latimer, who seems generally to be with the majority in the instruction cases, at times finds himself standing alone. The court had previously held that a law officer was not, in the absence of request, under a duty to define "reasonable doubt,"²⁷ and the question later arose as to his obligation when presented with an unsolicited request for additional instructions thereon.²⁸ The majority concluded that the law officer was obliged to comply with the substance of such a request. Judge Latimer in dissent stated that "reasonable doubt" is "an ordinary expression and well understood by members of military courts-martial" and admonished the court that it should not "build a system where it is profitable for an accused to submit a great variety

²⁵ *United States v. Burden*, 2 USCMA 547, 10 CMR 45 (1953).

²⁶ *Ibid.*

²⁷ *United States v. Soukup*, 2 USCMA 141, 7 CMR 17 (1953). The same rule applies to "carnal knowledge." *United States v. Parker*, 3 USCMA 272, 12 CMR 28 (1953).

²⁸ *United States v. Offley*, 3 USCMA 276, 12 CMR 32 (1953). Judge Latimer also dissented in *United States v. Heims*, 3 USCMA 418, 12 CMR 174 (1953), on the ground that a defense of inability to comply with an order was not fairly raised by the evidence and that in any event the instructions as given covered it.

of instructions covering every conceivable subject to the law officer in the hopes that one refusal might be grounds for reversal."

It should not be assumed from these few examples that the court is in anything like total disagreement in the instruction area. For the most part recent opinions have been unanimous. The entire court agreed or substantially agreed that terms in instructions need not be further defined in the absence of request;²⁹ that an instruction on lesser offenses was not required where such offenses were not reasonably in issue³⁰ and was required where they were;³¹ that there must be an instruction on wilfulness where the offense is wilful discharge of a firearm;³² that insanity or intoxication must be charged when in issue³³ but not otherwise;³⁴ that the element or defense of knowledge, if in issue, must be framed by instructions where the charge is disobedience of or disrespect towards a "superior";³⁵ that self-defense need not be

²⁹ United States v. Soukup, 2 USCMA 141, 7 CMR 17 (1953); United States v. Parker, 3 USCMA 272, 12 CMR 28 (1953); United States v. Felton, 2 USCMA 630, 10 CMR 128 (1953); United States v. Amdahl, 3 USCMA 199, 11 CMR 199 (1953).

³⁰ United States v. Parker, supra note 29 (rape); United States v. Clark, 2 USCMA 437, 9 CMR 67 (1953) (same); United States v. Benavides, No. 876, USCMA (1953) (premeditated murder); United States v. Riggins, 2 USCMA 451, 9 CMR 81 (same).

³¹ United States v. Cloutier, No. 662, USCMA (1953) (assault and battery in robbery). Judge Brosman in dissenting in this case was on the opposite side of the fence from his usual view, simply because, however, he perceived no basis in the facts for saying that the lesser offense was reasonably raised and "never suspected heretofore that the term 'reasonably raised alternative' was synonymous with 'every remotely conceivable alternative.'" See also United States v. Johnson, 3 USCMA 209, 11 CMR 209 (1953) (involuntary manslaughter in unpremeditated murder) (Quinn, C. J., dissenting but without reference to the legal principle); United States v. Burr, No. 1215, USCMA (1953) (wrongful appropriation in larceny); United States v. Apple, 2 USCMA 592, 10 CMR 90 (1953) (absence without leave in desertion with intent to avoid hazardous duty) (Latimer, J., concurring); United States v. Cline, No. 769, USCMA (1953) (same); United States v. Richardson, 6 CMR 88 (1952) (assault and battery in robbery).

³² United States v. Nidy, 3 USCMA 408, 12 CMR 164 (1953).

³³ In United States v. Backley, 2 USCMA 496, 9 CMR 126 (1953), it is stated: "... where the drunkenness of the accused ... is fairly raised by evidence in such a posture as to suggest a reasonable possibility that the intoxication was of a kind and extent likely to affect the ability of accused to entertain a specific intent, the law officer is required to instruct (1) on the legal effect of intoxication in relation to specific intent, and (2) as to the elements of lesser offenses not involving such an intent, if any." See also United States v. Haywood, No. 1852, USCMA (1953) (intoxication); United States v. Burns, 2 USCMA 400, 9 CMR 30 (1953) (insanity); United States v. Groves, No. 1900, USCMA (1953) (intoxication); United States v. Miller, 2 USCMA 94, 7 CMR 70 (1953). The correct procedure for treating an issue of insanity is set forth in United States v. Trede, 2 USCMA 581, 10 CMR 79 (1953).

³⁴ United States v. Holman, 3 USCMA 396, 12 CMR 152 (1953) (insanity and intoxication); United States v. Trede, supra note 33 (insanity); United States v. Hagelberger, 3 USCMA 259, 12 CMR 15 (1953) (both); United States v. Benavides, No. 876, USCMA (1953) (intoxication).

³⁵ In United States v. Benders, 10 CMR 118 (1953), knowledge was in issue. Knowledge was not in issue in United States v. Majia, 2 USCMA 616, 10 CMR 114 (1953); United States v. Etchon, 3 USCMA 394, 12 CMR 150 (1953); and United States v. Wallace, 2 USCMA 595, 10 CMR 93 (1953). As appears from his concurring opinions

charged where not in issue;³⁶ that the court must be instructed, in cases of misbehavior before the enemy, that the offense requires a motivation of fear;³⁷ that an instruction on character evidence must be given on request³⁸ but not otherwise;³⁹ and that there is no need to instruct in the precise language of a request.⁴⁰

To summarize, in a broad and therefore somewhat inaccurate manner, the divergent views of the judges, it may be said that Judge Brosman is inclined to place a heavier responsibility for proper instructions directly upon the law officer than are his colleagues. Judge Latimer requires less technical nicety in instructions and is fearful lest the whole burden of the trial be placed upon the law officer. If the record convinces him that the court-martial understood the elements of the crime, he is not overly concerned with where they gleaned that knowledge, whether from the law officer, arguments of counsel or common understanding. Chief Judge Quinn stands roughly between the position of Judge Latimer and that of Judge Brosman.

III

THE CONCEPT OF PREJUDICE

The discussion of instructions has perhaps already shed some light on the varying views of the judges concerning prejudicial error.⁴¹ Judges Brosman and Latimer both expounded at length on the latter subject in *United States v. Woods and Duffer*.⁴² Their writings in that case are more like essays on jurisprudence than typical appellate opinions—probably inevitably, and perhaps designedly, so. It is natural enough for a new court to wrestle hard with abstract concepts in formulating standards of review. Indeed this jurisprudential quality of some of the court's opinions lends added flavor and interest to them.

In *Woods and Duffer* the law officer was called into session with

in all or some of those cases Judge Brosman's view was somewhat different from the majority. The majority did not regard it as essential to determine whether knowledge was an element of the offense or a matter of defense because in either event it was not in issue. Judge Brosman felt that want of knowledge was purely defensive, and, since the defense was not raised, the instructions were complete. See also Note, 5 *Stan. L. Rev.* 366 (1953).

³⁶ *United States v. Troglin*, 3 USCMA 385, 12 CMR 141 (1953); *United States v. Amdahl*, 3 USCMA 199, 11 CMR 199 (1953).

³⁷ *United States v. McCormick*, 3 USCMA 361, 12 CMR 117 (1953); *United States v. Brown*, 3 USCMA 98, 11 CMR 98 (1953); *United States v. Soukup*, 2 USCMA 141, 7 CMR 17 (1953); *United States v. King*, No. 948, USCMA (1953).

³⁸ *United States v. Phillips*, 3 USCMA 137, 11 CMR 137 (1953).

³⁹ *United States v. Schumacher*, 2 USCMA 134, 7 CMR 10 (1953).

⁴⁰ *United States v. Beasley*, 3 USCMA 111, 11 CMR 111 (1953).

⁴¹ An analysis of general prejudice is contained in an excellent article by Aycock, *The Court of Military Appeals—The First Year*, 31 *N.C.L. Rev.* 1 (1952). See also Note, 6 *Vand. L. Rev.* 414 (1953).

⁴² 2 USCMA 203, 8 CMR 3 (1953).

the court, in the absence of the accused and their counsel, after the court had closed to deliberate on the sentence, and in violation of the Code he gave legal advice as to sentence matters while thus closeted. The court reversed, finding "general prejudice." In dissenting Judge Latimer branded "the visionary rule of general prejudice" as a doctrine "so incomprehensible and so lacking in identifiable standards that it can be measured only by the individual whims of appellate judges," which fact suggested "an assumption of power by this Court, undisclosed, undefined and uncontrolled, to deal with any case in which we desire as a matter of policy or administration, to reach a desired result." Judge Latimer pointed to Article 59(a) of the Uniform Code which provides that a finding or sentence shall not be held incorrect unless an error "materially prejudices the substantial rights of the accused" and construed it to mean that the court must "search the record in the particular case to determine whether any substantial right of the accused has been materially prejudiced." This might be called a "specific prejudice" test.

Judge Brosman, on the other hand, concurring with Chief Judge Quinn, found that "general prejudice" was simply a convenient "juris-tic device," analogous to "military due process," but designed to cover violations of "rights only slightly less important and specific in quality than those embodied in the concept of military due process." He opined that Judge Latimer had already subscribed to the concept of general prejudice under a different name and was waging only "a war of tags and labels—a really pointless debate in the sphere of semantics." In Judge Brosman's view, Article 59(a) merely forbade reversals for inconsequential or minor technical errors. Since the "bipartite character of the court-martial" is "a structural member in the military judicial scheme," Judge Brosman regarded the closed conference in *Woods and Duffer* as amounting to general prejudice.

A number of these closed conference cases have been reversed for general prejudice,⁴³ but the court has also decided that the doctrine will not be invoked where there is only assistance by the law officer in putting the sentence in proper form rather than participation in the deliberations of the court.⁴⁴

⁴³ *United States v. Curtis*, 2 USCMA 311, 8 CMR 111 (1953) (Latimer, J., dissenting); *United States v. Miller*, No. 1537, USCMA (1953) (Latimer, J., concurring in the result since the conversation was not even in the record); *United States v. Mann*, No. 924, USCMA (1953) (Latimer, J., dissenting); *United States v. Jester*, No. 1655, USCMA (1953) (Latimer, J., dissenting); *United States v. Gladden*, No. 896, USCMA (1953) (Latimer, J., concurring in the result since the law officer incorrectly instructed the court in the absence of accused); *United States v. Holland*, No. 1574, USCMA (1953) (Latimer, J., dissenting and commenting that the case shows one of the "absurdities" of the general prejudice doctrine).

⁴⁴ *United States v. Miskinis and Pontillo*, 2 USCMA 273, 8 CMR 73 (1953) (Lat-

It would appear that Judge Latimer's opposition to general prejudice is more than mere semantics. The root of the matter seems to be that Judges Quinn and Brosman are inclined, presumably for reasons of policy, to give a different interpretation to Article 59(a) than is Judge Latimer. Both interpretations are logically defensible and have much to commend them; the choice is one of policy rather than grammar. This writer for one feels that the judges should be hesitant in categorizing error as "harmless." The court makes law not alone for the cases which come before it but for future application by courts-martial all over the world. Where possible the rules of this law should be drawn in blacks and whites rather than grays, and a too detailed inquiry into prejudice in individual cases may make more difficult the attainment of that objective.

IV

SUFFICIENCY OF EVIDENCE TO SUSTAIN CONVICTIONS

One commentator has stated that Judges Quinn and Brosman have "unquestionably gone beyond the traditional conservative scope of appellate review."⁴⁵ Judge Latimer is apparently in agreement with this observation. He has repeated his charge of last year⁴⁶ that his colleagues "weigh evidence and determine credibility of witnesses."⁴⁷

Sufficiency of evidence is thus another field where the court is sharply divided. Of course, this is not an unusual phenomenon. Shadowy is the line between testing for evidential insufficiency as a matter of law (which is clearly within the province of an appellate court), and reweighing evidence. Judges of appellate courts frequently disagree on where it shall be drawn. This writer is not prepared to say that the Court of Military Appeals has overstepped the boundary, particularly since it sustained convictions in two recent desertion cases when evidence of the requisite intent was very "thin" indeed.⁴⁸

imer, J., concurring in the result); *United States v. Allen*, No. 1260, USCMA (1953) (Latimer, J., concurring in the result); *United States v. Derosier*, No. 1801, USCMA (1953) (Latimer, J., concurring in the result); *United States v. Fields*, No. 1424, USCMA (1953) (Latimer, J., concurring in the result); *United States v. Reinking*, 2 USCMA 360, 8 CMR 160 (1953) (unanimous); *United States v. Ferry*, 2 USCMA 326, 8 CMR 126 (1953) (error cured by repeating closed session communication in open court; Latimer, J., concurring in the result); *United States v. Freeman*, No. 1769, USCMA (1953) (same).

⁴⁵ Landman, *One Year of the Uniform Code of Military Justice: A Report of Progress*, 4 *Stan. L. Rev.* 491, 502 (1952).

⁴⁶ *United States v. O'Neal*, 1 USCMA 138, 2 CMR 44 (1952).

⁴⁷ *United States v. Oliver*, No. 1529, USCMA (1953) (desertion with intent to remain absent permanently); *United States v. Logas*, 2 USCMA 489, 9 CMR 119 (1953) (same).

⁴⁸ *United States v. Squirrel*, 2 USCMA 146, 7 CMR 22 (1953) (Quinn, C. J., dissenting) (even the majority opinion recognized that the intent with which accused left his unit was "obscure and unknown" because of the failure of "all counsel at the trial level to exploit fully the possibilities of presenting evidence favorable to their side"); *United States v. Knoph*, 6 CMR 108 (1952) (Brosman, J., dissenting).

V

ARTICLE 134 OF THE UNIFORM CODE

One of the few areas in which a decision of the Court of Military Appeals has run afoul of unfavorable comment is that of Article 134, the "general article" of the Code, which, among other things, proscribes "all disorders and neglects to the prejudice of good order and discipline" and "all conduct of a nature to bring discredit upon the armed forces." It is understandable that civilian lawyers should view with alarm such a wide sweeping statute despite its long history in our military law (going back to 1775) which has engrafted upon it much greater definiteness than appears upon the face.

Thus the decision in *United States v. Kirchner*,⁴⁹ which recognized homicide through simple negligence—a crime unknown to civilian law—as an offense under Article 134, has been severely criticized.⁵⁰ Nonetheless the court this year upheld the Article against charges of unconstitutional vagueness and uncertainty,⁵¹ and applied it in a number of instances.⁵² The tribunal did, however, serve notice that Article 134 should generally be limited to "military offenses and those crimes not specifically delineated by the punitive Articles."⁵³

VI

MISCELLANEOUS MATTERS

Depositions.—In *United States v. Sutton*⁵⁴ the Court of Military Appeals held that a deposition was admissible though taken when neither the accused nor his counsel at the trial was present. Other qualified counsel represented the accused at the time of the taking of

⁴⁹ 4 CMR 69 (1952).

⁵⁰ 21 Geo. Wash. L. Rev. 641, 644 (1953). "Congress in expressly providing for the crimes of murder and manslaughter in the new Uniform Code . . . without mention of any lesser degree of homicide either in the code or in the Index and Legislative History thereof, neither contemplated nor sanctioned the offense of homicide through simple negligence."

⁵¹ *United States v. Frantz*, 7 CMR 37 (1953).

⁵² *United States v. Frantz*, supra note 51 (wrongful possession of liberty card with intent to deceive); *United States v. Beach*, 7 CMR 48 (1953) (negligent failure to deliver mail); *United States v. Alexander*, 3 USCA 346, 12 CMR 102 (1953) (accepting money for transporting passenger in government vehicle); *United States v. Karl*, 3 USCA 427, 12 CMR 183 (wrongful sale of liberty pass form).

⁵³ *United States v. Norris*, 2 USCA 236, 8 CMR 36 (1953). Judge Brosman in a concurring opinion expressed serious doubt on this point. It was decided in *United States v. Deller*, 3 USCA 409, 12 CMR 165 (1953), *United States v. O'Neill*, 3 USCA 416, 12 CMR 172 (1953), and *United States v. Johnson*, 3 USCA 174, 11 CMR 174 (1953) that offenses sounding in unauthorized absence are not cognizable under Article 134. The further holding in the *Deller* and *O'Neill* cases that basic training constitutes "important service" within the meaning of the offense of desertion with intent to shirk important service would seem somewhat questionable.

⁵⁴ 3 USCA 220, 11 CMR 220 (1953).

the deposition, and the court held that he had not been unlawfully deprived of the right to confront witnesses.⁵⁵ Another case held that, though the prosecution's use of depositions in a capital case was error, since the accused had not expressly consented, the error was not prejudicial upon the record before the court.⁵⁶ Still another decision took the view that allowing a deposition in evidence when the witness was available at the trial did amount to prejudicial error.⁵⁷

Self-Incrimination.—Article 31 of the Uniform Code gives rights substantially in excess of those conferred by the ordinary privilege against self-incrimination, but this year some limitations have been read into its seemingly absolute language. Recent decisions held that, where the accused was informed that he was under investigation for a specific crime, it was enough to tell him that any statement could be used against him without the necessity of adding the words "in a court-martial";⁵⁸ that it was not prejudicial error, where accused "knew full well that he was suspected of the homicide of his wife," to fail to inform him of the nature of the offense under investigation;⁵⁹ and that there was no necessity for affirmative proof that the required warning in respect to an admission (as distinguished from a confession) was given where there was no indication that the admission was involuntary.⁶⁰

Literature.—The flood of military-law articles abated somewhat this year, but a fair number were written, some of which are listed in the footnote.⁶¹

⁵⁵ In a vigorous dissent Chief Judge Quinn, after stating that he had "absolutely no doubt" that the Fifth and Sixth Amendments of the Constitution apply to courts-martial, concluded that accused's right to confrontation had been violated. As Judge Brosman pointed out in a concurring opinion, Judge Quinn apparently assumed the existence of power in the Court of Military Appeals to declare a section of the Uniform Code unconstitutional. This question has never yet been specifically passed upon.

⁵⁶ *United States v. Young*, 2 USCMA 470, 9 CMR 100 (1953). To similar effect is *United States v. Horner*, 2 USCMA 478, 9 CMR 108 (1953).

⁵⁷ *United States v. Barcomb*, 6 CMR 92 (1952).

⁵⁸ *United States v. O'Brien*, 3 USCMA 325, 12 CMR 81 (1953). This seems to be some retreat from *United States v. Pedersen*, 2 USCMA 263, 8 CMR 63 (1953) and *United States v. Williams*, 2 USCMA 430, 9 CMR 60 (1953). See also *United States v. Wilson and Harvey*, 2 USCMA 248, 8 CMR 48 (1953).

⁵⁹ *United States v. O'Brien*, 3 USCMA 105, 11 CMR 105 (1953).

⁶⁰ *United States v. Seymour*, 3 USCMA 401, 12 CMR 157 (1953). Other self-incrimination cases of interest are *United States v. Hatchett*, 2 USCMA 482, 9 CMR 112 (1953) and *United States v. Phillips*, 2 USCMA 534, 10 CMR 32 (1953).

⁶¹ Most important of the work in the periodicals is the excellent Symposium on Military Justice in 6 Vand. L. Rev. 161 (1953), containing contributions by the judges of the Court of Military Appeals, Professor Morgan, Captain Ward, Commissioners Walker and Nicbank, Major Currier and Captain Kent, Colonel Wurfel, General Snedeker, Mr. Pasley, Captain Mott, and Commanders Hartnett and Morton. Other articles include Mugal, Military Justice, Command, and the Field Soldier, 2 Buff. L. Rev. 183 (1953); ten Broek, Wartime Power of the Military Over Citizen Civilians Within the Country, 41 Calif. L. Rev. 167 (1953); Grimm, Criminal Justice in the Military Establishment, 37

Legislation.—The Senate, with certain reservations, consented to the ratification of the controversial Agreement between the Parties to the North Atlantic Treaty Regarding the Status of their Forces.⁶² The agreement, among other provisions, gives the treaty nations the primary right to exercise jurisdiction over members of the United States Armed Forces or civilian components in respect to all offenses committed by them within the territory of the treaty nations except those committed in the performance of duty or solely against United States property, security or personnel.⁶³ A similar agreement was reached with Japan.⁶⁴

VII

IMPROVEMENTS IN THE CODE

It is difficult to discuss possible improvements in the Uniform Code since at this writing the Annual Report of the Court of Military Appeals and the Judge Advocates General is not yet available. The Report is expected to be released early in 1954 and will doubtless contain a number of suggestions with supporting data.⁶⁵

A few observations may, however, be made at this time. There seems no doubt that the Code's requirement of a law officer and lawyers as counsel in all general courts-martial has placed a heavy burden upon the military services and their legally trained officers. This may conceivably result in suggestions to relax the requirement. Any such relaxation would be very unfortunate and analogous to reducing the standard of medical care because of a shortage of physicians. If the services do not have enough lawyers, consideration should be given to

J. of Am. Jud. Soc'y 14 (1953); Brosman, *The Work of the United States Court of Military Appeals*, 7 Miami L. Q. 211 (1953); Butts, *The First Year of the United States Court of Military Appeals*, 24 Miss. L.J. 300 (1953); Kelly, *Uniform Code and the Evolution of Military Law*, 22 U. of Cin. L. Rev. 343 (1953); Feld, *The Court-Martial Sentence: Fair or Foul?*, 39 Va. L. Rev. 319 (1953). General Snedeker published a volume on "Military Justice Under the Uniform Code" which is reviewed by General Harmon, *The Judge Advocate General of the Air Force*, 6 Vand. L. Rev. 421 (1953).

⁶² Exec. Treaty, 82d Cong., 2d Sess. (1952), signed at London on June 19, 1951, ratified by resolution of the Senate on July 15, 1953.

⁶³ See Report of Senator Wiley on Agreements Relating to the Status of the North Atlantic Treaty Organization, Armed Forces, and Military Headquarters. Sen. Exec. Rep. No. 1, 82d Cong., 1st Sess. (1951).

⁶⁴ N.Y. Times, Oct. 24, 1953, p. 3, col. 2. In what is perhaps the beginning of a substantial protest movement, the Military Justice Committee of the Queens County Bar Association, New York, in November, 1953, passed a resolution opposing the principle of both agreements. See also Senator John W. Bricker, *Safeguarding the Rights of American Servicemen Abroad*, The Judge Advocate Journal, Bull. No. 15, pp. 1, 2 (Oct. 1953): " . . . to put it bluntly, the American GI was sacrificed on the altar of international cooperation. . . ."

⁶⁵ The first report, covering the period from May 31, 1951, to May 31, 1952, recommended that Congress take no action on changes in the Code pending further experience, except for the elimination of the power of special courts-martial to adjudge bad conduct discharges. This has not yet been accomplished.

ways and means of obtaining more, including perhaps selective service deferments for qualified law students who agree to serve upon graduation in the Judge Advocates General Departments. Indeed, in this writer's opinion, the ultimate aim should be to bring the standards of special courts-martial up to those now prescribed for general courts.

There is, on the other hand, something to be said for an increase in the scope of nonjudicial punishment under Article 15 of the Code. The old Navy captain's mast and its Army equivalent did much to straighten out minor offenders against military discipline—especially youthful ones—without the stigma of court-martial convictions, and, in the zeal for reform, the framers of the Code may have swung too far away from this system. In serious offenses all the safeguards of the Code are necessary; in trivial cases they are not.

The extensive appellate machinery provided by the Uniform Code and the delays incident to its exercise have produced some serious administrative problems. There is no bail under the military system, of course, and a convicted man is of little or no use to the service during the full year which elapses on the average between the time of his trial and the time his conviction is finally affirmed or reversed by the Court of Military Appeals. Moreover, he must receive special confinement treatment during that time. The Judge Advocates General and their subordinates are working on these and kindred problems, however, and, to the extent possible, solutions will be found.

The military justice picture overall continues to look bright. The Court of Military Appeals, the boards of review, and the Judge Advocates General and their staffs are doing a splendid job despite heavy pressure. The weakest link in the chain is probably at the trial level but even there matters are much better than two years or even a year ago, as law officers, trial counsel, and defense counsel become more experienced in their duties.

CRIMINAL LAW

J. WALTER McKENNA

SEVERAL hundred opinions are handed down by appellate courts each year in the field of substantive criminal law. These opinions reflect only a small number of the criminal cases which begin and are finally terminated in the criminal trial courts. But by necessity this article is limited to an examination of a few appellate court opinions which, from a careful survey of several hundred, seem to the writer to disclose legal problems of current interest or of a novel or unusual aspect. Criminal procedure problems will be discussed in the article on Criminal Procedure.

Mental Disorders and Intoxication.—Problems of mental disorder and intoxication in the current cases indicated no unusual aspects. The Missouri Supreme Court reversed a judgment of conviction for an erroneous instruction relating to the burden of proving a defense of insanity.¹ In this case the state's own evidence showed that the defendant was insane when he shot the prosecuting witness who was aiding the sheriff in removing the defendant to an institution after he had been adjudged insane. The record also showed that the defendant's insanity was chronic and continuing. Under these circumstances it was improper for the trial court to instruct the jury that the law presumes one sane and the defendant had the burden of proving insanity. The established insanity of the defendant was presumed to continue and the burden was on the state to show that the defendant shot the witness during a lucid interval. A similar claim of error relating to the same problem in a California case² did not result in a reversal although the supreme court did consider the trial judge's instruction as to the one who carried the burden in the sanity stage of the trial somewhat confusing. The unusual circumstances present in the Missouri case³ were absent in the instant case and the California court adhered to the well-settled rule that the defendant must establish his defense of insanity by a preponderance of the evidence. Likewise the Supreme Court of Pennsylvania refused to believe that the defendant in a current murder case⁴ suffered any prejudice where the trial court in discussing the contrasting viewpoints of experts substituted the word "and" for the proper disjunctive "or" of the McNaughten right-and-wrong test of responsibility.⁵ The record

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¹ State v. Elsea, 251 S.W.2d 650 (Mo. 1952).

² People v. Daugherty, 256 P.2d 911 (Cal. 1953).

³ See note 1 supra.

⁴ Commonwealth v. Smith, 97 A.2d 25 (Pa. 1953).

⁵ McNaughten's Case, 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (H.L. 1843).

indicated that previous to the claimed prejudicial statement the trial court had thoroughly and correctly defined the right-and-wrong test of responsibility followed in that jurisdiction.

Questions relating to the ability of the accused to understand the proceedings being taken against him and to make a proper defense arose in several current cases. In New York in a first-degree murder case⁶ the trial court before whom the defendant was arraigned refused to accept the view of psychiatrists that the accused was mentally competent to defend himself against the charge and committed him to the state hospital until he sufficiently recovered. While the governing statutes in New York, Sections 662, 662-a to 662-c of the Code of Criminal Procedure, are clear that the court may find the accused sane enough to defend himself in spite of the official hospital examiners' views to the contrary, they are silent as to the right of the court to find the accused insane when the examiners found him sane. Apparently there are no reported New York cases giving the court this power, but a study of the historical background of these statutes would justify the action of the court here as carrying out what the Legislature intended but did not express clearly. But, in Louisiana, the supreme court ruled that a trial judge in that jurisdiction was without power to order one accused of murder returned to the State Hospital for the Insane for fear that, if released, the accused would be a menace to the community. Psychiatrists had found defendant sane enough to understand the proceedings and to assist his defense, reporting that he was afflicted with a brain syndrome which was presently in a state of remission.⁷ The Mississippi Supreme Court⁸ likewise ordered a trial judge to hold a preliminary trial in a larceny case to determine the present insanity of the accused where the judge had refused to grant such a motion in spite of the viewpoints of seventeen experts that defendant was insane. His refusal had been based solely on his observation of the accused in the courtroom. Several cases from other jurisdictions containing problems of mental disorder and criminal liability are cited in the footnotes.⁹

Difficulties of proof in the cases of suspected drunken drivers were hoped to be lessened in New York by the Legislature's addition of a section to the Vehicle and Traffic Law, permitting compulsory chemical testing of suspected drunken drivers of motor vehicles.¹⁰ Under its

⁶ *People v. Greene*, 203 Misc. 191, 116 N.Y.S.2d 561 (County Ct. 1952).

⁷ *State v. Swails*, 66 So.2d 796 (La. 1953).

⁸ *Shipp v. State*, 61 So.2d 329 (Miss. 1952).

⁹ *Sanders v. United States*, 205 F.2d 399 (5th Cir. 1953); *Wagstaff v. United States*, 198 F.2d 955 (D.C. Cir. 1952); *Lakey v. State*, 61 So.2d 117 (Ala. 1952); *Redwine v. State*, 61 So.2d 724 (Ala. 1952); *People v. Gomez*, 258 P.2d 825 (Cal. 1953).

¹⁰ N.Y. Veh. and Traf. Law, amended by insertion of § 71-a by N.Y. Laws 1953, c. 854.

terms a police officer who has reasonable grounds to suspect a person driving a motor vehicle while intoxicated may compel the driver to submit to a chemical test of the breath, blood, urine or saliva to determine the alcoholic content of the blood under penalty of revocation of his operator's license. Nonresident drivers will be penalized by the loss of driving privileges within the state. The section requires the blood test to be administered by a duly licensed physician but the breath, urine or saliva test may be made by the police officer.

In Wisconsin, a statute¹¹ permits the admission of medical testimony as to the result of a urinalysis of specimens taken from one accused of operating a motor vehicle while intoxicated if the test is taken within two hours of the time of arrest. In a current Wisconsin case¹² the supreme court was forced to reverse a judgment of conviction of negligent homicide resulting when the defendant drove his automobile while allegedly intoxicated due to the fact that the trial court admitted medical testimony of the urinalysis taken more than two hours after his arrest. While the court agreed with counsel that the statute might accomplish more if it contained language designating the time of accident or offense as a substitute for the word "arrest," the language of the statute was clear and unambiguous and no judicial construction of it was permitted.

Are the terms "alcoholic liquor" and "intoxicating liquor" synonymous in meaning? That was one of the questions submitted to the Nebraska Supreme Court on an appeal from a conviction for operating a motor vehicle while drunk.¹³ The statute¹⁴ under which the defendant had been convicted used the term "alcoholic liquor" while the complaint charged "while under the influence of intoxicating liquor." In spite of a rather ingenious argument that the defendant may have been under the influence of a medicinal preparation which affected his conduct but which was not of the kind and nature forbidden by statute, the court ruled that the two terms were synonymous in meaning as intended by the Legislature and that the defendant had suffered no prejudice.¹⁵

In the law reviews appeared an article by Dr. Robert Waelder on "Psychiatry and the Problem of Criminal Responsibility"¹⁶ and a series of three articles dealing with narcotics and their regulation.¹⁷ A new

¹¹ Wis. Stat. 85.13(2) (1951).

¹² State v. Resler, 262 Wis. 285, 55 N.W.2d 35 (1952).

¹³ Franz v. State, 156 Neb. 587, 57 N.W.2d 139 (1953).

¹⁴ Neb. Rev. Stat. 39-727 (1943).

¹⁵ See also State v. Lee, 237 N.C. 263, 74 S.E.2d 654 (1953).

¹⁶ 101 U. of Pa. L. Rev. 378 (1952).

¹⁷ Dession, Freedman, Donnelly & Redlich, Drug-Induced Revelation and Criminal Investigation, 62 Yale L.J. 315 (1953); King, The Narcotics Bureau and the Harrison Act: Jailing the Healers and the Sick, 62 Yale L.J. 736 (1953); Comment, Narcotics Regulation, 62 Yale L.J. 751 (1953).

book entitled *Psychiatry and the Law* by Dr. Manfred S. Guttmacher and Professor Henry Weihofen received a favorable review.¹⁸ The book *Forensic Psychiatry* by Dr. A. Davidson was a welcome addition to literature in the field of psychiatry. Several notes and decisions by students were written for the law reviews.¹⁹

Assaults.—Among the assault cases examined the most interesting one arose in North Carolina where the defendant was convicted for assault on the basis of a "look" which he directed toward the complaining witness.²⁰ At the time of the alleged assault the accused was alone in his automobile, driving at a rather slow speed. The witness testified: "He came on up the road real slow and kept watching me, and when he got about straight across from where I was he had his head out of the window leering at me a curious look." The Supreme Court of North Carolina reversed the conviction on the basis that these facts were insufficient to make out a case of assault. "It cannot be said," stated the court, "that a pedestrian may be assaulted by a look, however frightening, from a person riding in an automobile some distance away."²¹ While recognizing that the complaining witness was frightened, that fact alone was considered insufficient to constitute an assault in the absence of a menace of violence of such a nature as to put a reasonable person in fear of immediate injury, or to refrain from doing an act she would otherwise do.

Two cases from the District of Columbia, one of which was an affirmance²² and the other a reversal,²³ deserve inclusion in this survey. In both of these cases homosexual gestures by the defendants formed the basis for the assault charges. The reversal of judgment of conviction in the *McDermett* case was based on the view that the victim, a police officer, had placed himself in such a position by his own conduct in his apparent zeal to build up a case that he consented to the defendant's touching which in itself was a defense to the assault charge. But the affirmance of the judgment of conviction for the same charge in the *Dyson* case appears open to question. While physical injury is not essential to an assault, and the injury may be fear, shame or humiliation, it is difficult to picture the complaining police officer suffering fear, shame or humiliation when touched by the defendant. The officer was present for the purpose of receiving advances from homosexuals

¹⁸ 39 Va. L. Rev. 721 (1953).

¹⁹ Notes, 57 Dick. L. Rev. 333 (1953), 41 Ky. L.J. 232 (1953), 48 N.U.L. Rev. 94 (1953), 6 Okla. L. Rev. 194 (1953), 39 Va. L. Rev. 215 (1953); Decisions, 19 Brooklyn L. Rev. 319 (1953), 31 Chi-Kent Rev. 157 (1953), 32 Neb. L. Rev. 489 (1953), [1953] Wis. L. Rev. 560.

²⁰ *State v. Ingram*, 237 N.C. 197, 74 S.E.2d 532 (1953).

²¹ 74 S.E.2d 532, 536 (N.C. 1953).

²² *Dyson v. United States*, 97 A.2d 135 (D.C. Munic. Ct. App. 1953).

²³ *McDermett v. United States*, 98 A.2d 287 (D.C. Munic. Ct. App. 1953).

because, as he stated, "that is my job." It was the view of the dissenting judge in the instant case that while the defendant was charged with assault—in an attempt to evade the District of Columbia requirement of corroboration²⁴—the prosecution developed into one for making an invitation to commit an act of perversion.²⁵ As the prosecutor stated in his argument: "There is good reason for the Government to prosecute these cases. All the security agencies of the United States immediately fire these people as weak security risks. . . ."

Other assault cases raised questions which fall within well-settled rules. The Court of Appeals of Georgia²⁶ reversed a conviction of assault and battery where the defendant was exercising his right to use sufficient force to resist an illegal arrest by police officers. At the time of this arrest no crime was being committed in the presence of the officers. In a case²⁷ involving a charge of taking indecent liberties with a female of chaste character the Supreme Court of Washington followed the apparently prevailing view that it is not necessary to prove shame or other disagreeable emotions on the part of the prosecuting witness to establish the crime in question.

Sex Crimes.—In several jurisdictions questions of first impression relating to the crime of sodomy reached the courts. A New Jersey court²⁸ refused to accept pleas of *non vult* to accusations of sodomy where the evidence indicated only penetration *per os*. The common law is in accord with the view that the commission of the crime of sodomy required penetration *per anum* and did not include penetration *per os*. While American jurisdictions are not in agreement as to whether the crime of sodomy includes penetration *per os*, a greater number appear to favor the rule adopted by the New Jersey court. But in a current case²⁹ the Kansas Supreme Court refused to depart from its previously established rule that copulation *per os* is included in its construction of the meaning of a crime against nature. In the state of Washington³⁰ a sodomy conviction was reversed when the evidence did not show a penetration of the sexual organ by the defendant. It was the first time in that jurisdiction that the question was raised as to the necessity of penetration for this crime. While there is authority to the contrary a current decision³¹ from a California court held that where sodomy is charged with an animal the penetration may be either vaginal or anal.

²⁴ Kelly v. United States, 194 F.2d 150 (D.C. Cir. 1952).

²⁵ Id. at 156.

²⁶ Ronemous v. State, 87 Ga. App. 568, 74 S.E.2d 676 (1953).

²⁷ State v. Winger, 41 Wash.2d 229, 248 P.2d 555 (1952).

²⁸ State v. Morrison, 25 N.J. Super. 534, 96 A.2d 723 (Law Div. 1953).

²⁹ State v. Fletcher, 174 Kan. 530, 256 P.2d 847 (1953).

³⁰ State v. Olsen, 258 P.2d 810 (Wash. 1953).

³¹ People v. Smith, 256 P.2d 586 (Cal. 1953).

The much quoted observation of Lord Hale,³² to the effect that an accusation of rape is easily made, hard to be proved and still harder to be defended by one ever so innocent, concerned rape charges but it might be equally applicable to all sex crimes. This appears to be the view of the Chief Justice of the Indiana Supreme Court.³³ A sodomy conviction was reversed because of insufficient evidence to sustain it. The ten-year-old daughter of the defendant had charged him with sodomy on several occasions. The suggestion by the writer of this opinion that, at least in cases where the circumstances leave doubt as to the guilt of the accused when charged with a sex crime, the prosecutrix be compelled to submit to an examination by psychiatrists to ascertain her probable credibility deserves careful thought. It is submitted that the court might have properly extended the requirement to cover all cases where a sex charge is lodged.³⁴

In both the states of New Mexico and Idaho questions of first impression in the field of sex crimes reached the highest courts. The New Mexico Supreme Court in affirming a conviction for incest adopted the viewpoint of the majority of American jurisdictions that the consent of both parties is not an essential element of the crime of incest. It is immaterial that the same testimony would have sustained a conviction for rape.³⁵ In the Supreme Court of Idaho a conviction of the defendant for committing lewd and lascivious acts upon his eleven-year-old daughter was reversed when no evidence was offered to corroborate the story of the complaining witness.³⁶ It was declared the public policy of the state of Idaho that the testimony of the prosecuting witness in the prosecution for lewd and lascivious acts must be corroborated either by direct evidence or evidence of surrounding circumstances under the rule laid down in the *Elsen* case.³⁷

In other cases the Supreme Court of Appeals of Virginia ruled in opposition to defendant's argument that "an exposure of the person, irrespective of whether or not the place of exposure is a public one, made in the presence of only one person, is not a crime at common law,"³⁸ and the Ohio Supreme Court³⁹ reversed a judgment of conviction for assault with intent to rape where the trial judge gave a charge to the jury which permitted it to find the defendant guilty of an assault

³² 1 Hale's Pleas of the Crown 634 (1736).

³³ *Burton v. State*, 111 N.E.2d 892 (Ind. 1953).

³⁴ See 3 Wigmore, Evidence § 924a (3d ed. 1940).

³⁵ *State v. Hittson*, 57 N.M. 100, 254 P.2d 1063 (1953).

³⁶ *State v. Madrid*, 259 P.2d 1044 (Idaho 1953).

³⁷ *State v. Elsen*, 68 Idaho 50, 187 P.2d 976 (1947).

³⁸ *Noblett v. Commonwealth*, 194 Va. 241, 72 S.E.2d 241 (1952).

³⁹ *State v. Hetzel*, 159 Ohio St. 350, 112 N.E.2d 369 (1953).

with intent to rape if it merely found the defendant guilty of an attempt to rape.⁴⁰

Two federal cases contained unusual problems in this field. In the *Gill* case⁴¹ the argument by the defendant on appeal that a conviction for assault with intent to commit sodomy must be set aside because sodomy was not a crime against the United States in the absence of an act of Congress defining it, met with no success. The acts charged to the defendant were committed on a voyage across Lake Michigan from Chicago to Michigan City, Indiana, on a vessel enrolled under the United States laws. It was found that the acts of the defendant were committed within the boundaries of Indiana which defined such acts as sodomy under the Indiana statutes and within the maritime and territorial jurisdiction of the United States. Hence, by the terms of the United States Code, sodomy became a crime against the United States.⁴² In the other case⁴³ an indictment charging the defendant, an Indian, with the crime of carnal knowledge and abuse upon a seventeen-year-old Indian girl committed upon the Menominee Indian Reservation in Wisconsin was dismissed. Congress had failed to include the crime of carnal knowledge and abuse among the crimes set out in the Ten Major Crimes Act⁴⁴ which in effect displaces tribal jurisdiction with federal jurisdiction over the ten crimes mentioned in the Act.

The new book *The Sex Paradox* by Isabel Drummond was well received by the book reviewers.⁴⁵ There was also published an interesting study of forcible and statutory rape with emphasis upon the consent standard.⁴⁶

Robbery, Extortion and Embezzlement.—There was a noticeable paucity of opinions in the fields of larceny, robbery and extortion which did more than consider the sufficiency of the evidence to sustain the conviction. However, three cases from these fields should be included in this survey. In a current case⁴⁷ the Oklahoma Criminal Court of

⁴⁰ See also *State v. Gellerman*, 259 P.2d 371 (Wash. 1953) (sodomy conviction reversed for the inadvertent use of word "desire" for word "design" in instructions).

⁴¹ *United States v. Gill*, 204 F.2d 740 (7th Cir. 1953).

⁴² 18 U.S.C. § 13 (Supp. 1952). This section provides that whoever within the special maritime and territorial jurisdiction of the United States is guilty of any act which, although not made punishable by any enactment of Congress, would be punishable if committed within the jurisdiction of the state where such a place is situated by the laws in force at the time of the act, shall be guilty of a similar crime and subject to a similar punishment.

⁴³ *United States v. Jacobs*, 113 F. Supp. 203 (E.D. Wis. 1953).

⁴⁴ 62 Stat. 758 (1948), as amended, 63 Stat. 94 (1949), 18 U.S.C. § 1153 (Supp. 1952).

⁴⁵ 5 *Baylor L. Rev.* 331 (1953).

⁴⁶ Comment, *Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard*, 62 *Yale L.J.* 55 (1952).

⁴⁷ *Traxler v. State*, 251 P.2d 815 (Okla. 1952).

Appeals considered for the first time its statutory definition of robbery.⁴⁸ The necessity for construction of its robbery statutes arose from the fact that the accused argued on appeal that in seizing the car of the victim he had only the intention to escape pursuing officers and hence there was not the necessary *animus furandi* required for the crime of robbery. While agreeing that the common-law definition of robbery and the greater number of American statutory definitions of this crime require the presence of the *animus furandi* in the taking of the property, the court refused to adopt this requirement for committing the crime of robbery in Oklahoma in view of the use of the words "wrongful taking" in the statute and the apparent intent of the Legislature of Oklahoma to denounce the taking of personal property against the will of the possessor if accomplished by force or fear regardless of the state of mind or belief of the robber. As the court said:

An accord with the principle contended for would tend to weaken and destroy law and order and make all citizens liable to death, humiliation or at least a loss in the value of their property at the whim of the irresponsible and dangerous and facilitate the escape of gangsters, murderers or any other criminal, and could be expected to lead to disrespect for law and force the citizen for protection to resort to drastic personal action.⁴⁹

In the extortion field the New York *Fichtner* case⁵⁰ should be noted. The facts of the case were unusual. The defendant Fichtner was the manager and his codefendant the assistant manager of a supermarket. They observed the complaining witness, one Smith, while buying merchandise, steal a fifty-three cent jar of coffee. The defendant, Fichtner, later called Smith to the store. Then the defendants threatened to call the police and to arrest Smith for petty larceny unless he paid them seventy-five dollars and signed a paper admitting thefts over a period of time. Finally Smith signed the paper admitting he had stolen goods worth fifty dollars. He gave them twenty-five dollars and agreed to pay the balance at five dollars a week. Later he notified the police who arrested the defendants. The defendants had placed the twenty-five dollars in the cash register of their employers. The evidence revealed that the defendants had operated in the same way in some twenty-eight other instances with signed admissions of thefts of merchandise in varying amounts. In each instance the money was turned over to the employer. A charge of extortion⁵¹ was placed against the defendants. They were convicted in the trial court.

⁴⁸ Okla. Stat. tit. 21, § 791 (1951).

⁴⁹ 251 P.2d 815, 837 (Okla. 1952). In drawing the conclusion in the instant case the court overruled *Johnson v. State*, 24 Okla. Crim. Rep. 326, 218 Pac. 179 (1923), which in effect adopted the common-law definition of robbery.

⁵⁰ *People v. Fichtner*, 281 App. Div. 159, 118 N.Y.S.2d 392 (2d Dep't 1952).

⁵¹ Section 850 of the New York Penal Law provides: "Extortion is the obtaining of

The judgment of conviction was affirmed by the Appellate Division, Justice Wenzel dissenting. The contention of the defendants that it was error for the trial court to refuse to charge "if in the judgment of the jury the defendants honestly believed that the amount which the complainant paid or agreed to pay represented the approximate amount of the merchandise which he or they had previously stolen from the Hill Supermarket, then the defendants must be acquitted" was not considered sound by the majority of the members of the court. While it cannot be denied that Justice Johnston in writing the opinion for the court establishes the acts of the defendants strictly within the legal framework of the extortion statute, it is submitted that it is difficult to disagree with the viewpoint of Justice Wenzel in his dissenting opinion in which he states:

As a result of the court's charge and refusal to charge the jury was permitted to convict defendants of the crime of extortion on proof that they had induced complainant, by the threats alleged, to pay to defendants more than he rightfully owed for goods which he had stolen, even though defendants might have honestly believed that the amount demanded from complainant was the amount which he rightfully owed. In my opinion, although the question is one as to which there is a conflict of authority, if defendants, acting without malice and in good faith, made an honest mistake, they were not guilty of the crime charged. There would then be no criminal intent. The defendants were not acting in their own behalf but in that of their employer, in recovering what they believed to be rightfully due it. I find no precedent to indicate that the statute was intended to cover a case of this kind.⁵²

In another case⁵³ involving a rather unusual fact situation the Pennsylvania Supreme Court upheld the conviction of a cotenant for fraudulent conversion in appropriating money to his own use contrary to the terms of an agreement which he had made with cotenants. Vigorous dissents were filed by two members of the court. The record showed that the defendant had entered into a "Cotenancy Agreement" with others to be associated for the purpose of acquiring and operating certain properties of lands in Pennsylvania. The proportionate share of each of the said "cotenants" was a one-fourth interest. The argument of the defendant that as a cotenant he could not fraudulently convert or embezzle property of the cotenancy in all of which he had an undivided part ownership was not acceptable to the majority mem-

property from another . . . with his consent, induced by a wrongful use of . . . fear" Section 851 of the New York Penal Law provides: "Fear, such as will constitute extortion, may be induced by an oral or written threat. . . . 2. To accuse him or any relative of his or any member of his family, of any crime: or, 3. To expose, or impute to him, or any of them, any . . . disgrace. . . ."

⁵² See *People v. Fichtner*, 281 App. Div. 159, 166, 118 N.Y.S.2d 392, 399 (2d Dep't 1952).

⁵³ *Commonwealth v. Bovaird*, 373 Pa. 47, 95 A.2d 173 (1953).

bers of the court. It was their view that, although a cotenant, he was primarily an agent for the others and solely by virtue of his agency status that he came into possession of the monies with which he was charged with embezzling. "He cannot," said the court, "escape criminal liability by doffing the wrap of agency, a garment of his own making, and donning the cloak of cotenancy with its fictional legal attribute."⁵⁴

Some interesting materials dealing with problems in this field appeared in the current law reviews. They are cited in the footnotes.⁵⁵

The Homicide Cases.—Among the felony-murder cases reaching appellate courts during the period of this survey the *Keshner* case⁵⁶ in New York deserves inclusion here. Although the Court of Appeals affirmed the conviction for felony murder without opinion except for the dissent by Judge Lewis, the facts of this case appear to be most unusual. A police officer and two of the defendant's accomplices were killed when a fire—ignited in an unknown manner—erupted in a loft building where the defendant conducted a coat and jacket manufacturing business. The premises had been saturated with gasoline. The defendant admitted that he was attempting to commit arson in the second degree for the purpose of collecting the insurance money. At the moment of the eruption of the fire the defendant was seated in a car in custody of a police officer. Each of the accomplices was under arrest and in custody of a police officer with whom they had entered the gasoline-soaked premises. Apparently the dissenting judge could not satisfy himself from a review of the evidence that the defendant was "engaged in" arson in view of the facts that it was never established how the fire was ignited and that the defendant was in custody outside of the loft at the time of the fire.

Less unusual were the fact situations in other felony-murder cases examined for this survey. In a New Jersey case⁵⁷ where the basic felony charged was robbery, the New Jersey Supreme Court affirmed a judgment of conviction even though the trial court did not instruct the jury to find the specific intent essential for robbery where its commission was an undisputed fact in the case. But the same court in another case⁵⁸ reversed a judgment of conviction where the jury did not designate its verdict of guilty in the first or second degree. The trial judge had instructed the jury that it could not consider murder

⁵⁴ *Id.* at 58, 95 A.2d at 177.

⁵⁵ Pearce, *Theft by False Promises*, 101 U. of Pa. L. Rev. 967 (1953); Eagan, *Shoplifting and the Law of Arrest: The Merchant's Dilemma*, 62 Yale L.J. 788 (1953); Notes and Comments, 53 Col. L. Rev. 407 (1953), 6 Loyola L. Rev. 145 (1952), 25 Rocky Mt. L. Rev. 325 (1953), 39 Va. L. Rev. 232 (1953), 1952 U. of Ill. L. Forum 449.

⁵⁶ *People v. Keshner*, 304 N.Y. 968, 110 N.E.2d 892 (1953).

⁵⁷ *State v. Grillo*, 11 N.J. 173, 93 A.2d 328 (1952).

⁵⁸ *State v. Greely*, 11 N.J. 485, 95 A.2d 1 (1953).

in the second degree or manslaughter. It had recommended life imprisonment. In the dissent filed in this case Chief Justice Vanderbilt contended that the jury's verdict was unambiguous and unmistakable.⁵⁹ "To set it aside," said Justice Vanderbilt, "is to make a shibboleth out of the statute." Two other felony-murder cases are cited in the footnotes.⁶⁰

A rather technical question arose in a homicide case before the Ohio Court of Appeals.⁶¹ The defendant had been charged with murder under the Ohio statutes⁶² which provide that a person who purposely and wilfully kills a policeman while in discharge of his duties is guilty of murder. The evidence revealed the police officer had become suspicious of the defendant's actions while operating a Lincoln automobile. He asked for identification. The defendant claimed his identification papers were in his room. While the two were ascending the stairs to the defendant's room, he turned suddenly and shot the officer. The defendant argued that the officer was not in the "discharge of his duties" at the time of the killing but was in fact disobeying the laws of the state in not taking the defendant before a magistrate without unnecessary delay or not transporting him to the police station. In affirming the conviction the court ruled that in "preserving the peace" as he was obligated to do the officer was killed in the "discharge of his duties."

In other murder cases a variety of questions were presented to the courts. In Oregon the supreme court reversed a conviction⁶³ where the trial court failed to submit to the jury an issue of involuntary manslaughter though not requested to do so. Apparently it was the first time that the question had been raised: whether, in a capital case, the mere taking of an exception to the court's failure to instruct upon a crime of lesser grade included within the crime charged and of which under the evidence the defendant might be found guilty raises a question for consideration on appeal, or whether there must have been a request for such an instruction. Another reversal of a murder first-degree conviction was ordered by the Supreme Court of Iowa⁶⁴ where defendant was sentenced to death on his plea of guilty to murder in the first degree, the trial court not having determined the degree by examination of witnesses, as required by statute. In Georgia, the

⁵⁹ *Id.* at 495, 95 A.2d at 6.

⁶⁰ *Kelley v. State*, 110 N.E.2d 860 (Ind. 1953); *State v. Taborsky*, 139 Conn. 475, 95 A.2d 59 (1953).

⁶¹ *State v. Ross*, 92 Ohio App. 29, 108 N.E.2d 77 (1952).

⁶² Ohio Gen. Code Ann. § 12402-1 (Supp. 1952).

⁶³ *State v. Nodine*, 259 P.2d 1056 (Ore. 1953).

⁶⁴ *State v. Martin*, 243 Ia. 1323, 55 N.W.2d 258 (1952).

supreme court upheld the right of the jury in a murder case to recommend mercy with or without reasons or for any reason satisfactory to the jury.⁶⁵

While a great number of current manslaughter cases reached the appellate courts, the problems presented to the courts were for the most part relating to questions of the admissibility of evidence or the sufficiency of the evidence to sustain the conviction. Some of these cases are noted briefly in the footnotes.⁶⁶

The legal literature in this field was again enriched by Professor Roy Moreland's thoughtful article entitled "A Suggested Homicide Statute For Kentucky."⁶⁷ Other materials relating to homicide are cited in the footnotes.⁶⁸

Miscellaneous Opinions and Legal Materials.—There were several cases concerning a variety of legal problems which can be briefly noted in this survey. The constitutionality of a Virginia statute⁶⁹ relating to the effect of possession of burglarious tools was under attack for the first time in its seventy-five years of operation. It was upheld by the Supreme Court of Appeals of Virginia against the contention of the defendant that it compelled a person in a criminal case to be a witness against himself.⁷⁰ Similar attacks in the past on the constitutionality of statutes making proof of one fact presumptive or prima facie evidence of another fact have met with no success.

Since 1934 the Federal Kidnaping Act⁷¹ has extended its coverage to persons who have been kidnaped and held not only for reward but for any other reason. The wisdom of this broad coverage was illustrated in a current case⁷² decided by the United States court of appeals when it upheld the conviction of members of the Ku Klux Klan who had seized and flogged a man and woman for alleged improper conduct. But in another case⁷³ from the United States Court of Appeals for the District of Columbia Circuit there was a reversal of a conviction for vagrancy of a defendant who had a record of four pre-

⁶⁵ *Strickland v. State*, 209 Ga. 675, 75 S.E.2d 6 (1953).

⁶⁶ See the following homicide cases arising out of negligent operation of a motor vehicle: *State v. Peckham*, 263 Wis. 131, 56 N.W.2d 835 (1953); *State v. Schmack*, 264 Wis. 333, 58 N.W.2d 668 (1953); *Meeks v. State*, 64 So.2d 290 (Fla. 1953); *State v. Schrader*, 243 Ia. 978, 55 N.W.2d 232 (1952); See also excellent dissenting opinion in *Commonwealth v. Sallade*, 374 Pa. 429, 97 A.2d 528 (1953).

⁶⁷ 41 Ky. L.J. 139 (1952).

⁶⁸ *Moffit, Negligent Homicide in the Operation of an Automobile: Kentucky's 1952 Statute*, 41 Ky. L.J. 68 (1952); *Notes and Comments*, 41 id. 88, 94 (1952), 41 id. 460 (1953), 5 S.C.L.Q. 543 (1953); *Decisions*, 57 Dick. L. Rev. 254 (1953), 31 Texas L. Rev. 432 (1953), 21 U. of Cin. L. Rev. 492 (1952).

⁶⁹ Va. Code tit. 18, § 159 (1950).

⁷⁰ *Burnette v. Commonwealth*, 194 Va. 785, 75 S.E.2d 482 (1953).

⁷¹ 18 U.S.C. § 1201(a) (Supp. 1952).

⁷² *Brooks v. United States*, 199 F.2d 336 (4th Cir. 1952).

⁷³ *Beall v. District of Columbia*, 201 F.2d 176 (D.C. Cir. 1952).

vious convictions for prostitution and one conviction for pandering. The cause of reversal was the court's view that the statute,⁷⁴ which provided that anyone who wanders about streets at late or unusual hours without visible and lawful business and not giving a good account of himself is deemed a vagrant, was not satisfied when the arresting officer did not demand that defendant explain her presence on the street. The record showed that on many previous times the officer had questioned the accused and received bantering replies indicating her actions involved possible prostitution.

One of the few cases on record of recklessly operating an aircraft arose in Oklahoma⁷⁵ when the criminal court of appeals of that state held that the trial court was not too severe in imposing a fine of \$100 and a thirty-day jail sentence on the accused who was not only drunk during the operation of the plane but disregarded landing instructions at a busy municipal airport.

Several cases from New York should be noted. A number of them involved contempt proceedings. In one case⁷⁶ the proceedings to punish for contempt were dismissed wherein a juror was held in contempt for allegedly violating the admonition of the trial judge not to discuss the case before it was finally submitted. In pointing out that a juror could not be punished for his attitude in the jury room as to any proposed verdict but only punished by indictment and trial for corrupt conduct, the Appellate Division further indicated that the juror cannot be questioned as to his attitude in the jury room toward a verdict in order to relate the attitude to establish a proper charge of contempt. In another case⁷⁷ a conviction for criminal contempt was affirmed without majority opinion by the Appellate Division because the accused had given testimony before the grand jury which was palpably false, patently evasive, and intentionally designed to withhold truth. Justice Nolan, in a dissent, warned against the unwarranted use of contempt proceedings to punish for false swearing stating:

Generally speaking, however, false swearing does not constitute a criminal or civil contempt. No statute so provides, either expressly or by reasonable implication. On the bare issue of perjury appellant was entitled to a trial by jury under the safeguards of the criminal law.⁷⁸

In another case⁷⁹ a petty larceny conviction arising out of a situation wherein a wife was charged with stealing personal effects from her

⁷⁴ D.C. Code § 22-3302(8) (1951).

⁷⁵ *Sanders v. State*, 256 P.2d 205 (Okla. 1953).

⁷⁶ *People v. Diefendorf*, 281 App. Div. 465, 119 N.Y.S.2d 469 (1st Dep't 1953).

⁷⁷ *Application of Grand Jury of Westchester County*, 281 App. Div. 706, 119 N.Y.S.2d 361 (2d Dep't 1952).

⁷⁸ 119 N.Y.S.2d 361, 363 (2d Dep't 1952).

⁷⁹ *People v. Dunlap*, 116 N.Y.S.2d 434 (County Ct. 1952).

husband was reversed. The unusual angle of this case was that the act took place after the parties had separated and pending the finality of an interlocutory decree of divorce. Until the divorce decree became final the court ruled that the principle that a wife cannot be subjected to a conviction of petty larceny for stealing from her husband applied.

The miscellaneous legal materials published during the year included such interesting articles as "Penology: Its Social Objective" by Professor Herbert D. Laube;⁸⁰ "The Criminal Intent" by Professor Marcel Frym;⁸¹ "Vagrancy And Other Crimes Of Personal Condition" by Professor Forrest W. Lacey;⁸² "Criminal Law" (a survey of the Georgia criminal law and procedure) by H. T. O'Neal, Jr.;⁸³ "Criminal Law and Procedure" (a survey of the New Jersey criminal law and procedure) by Professor C. Willard Heckel and Professor Malcolm D. Talbott.⁸⁴ Some excellent student work appeared in the law reviews. They are cited in the footnotes.⁸⁵

⁸⁰ 38 Cornell L.Q. 356 (1953).

⁸¹ 31 Texas L. Rev. 260 (1953).

⁸² 66 Harv. L. Rev. 1203 (1953).

⁸³ 4 Mercer L. Rev. 44 (1952).

⁸⁴ 7 Rutgers L. Rev. 90 (1952).

⁸⁵ Notes and Comments, 53 Col. L. Rev. 540 (1953), 26 So. Calif. L. Rev. 425 (1953); Decisions, 41 Geo. L.J. 433 (1953), 66 Harv. L. Rev. 926 (1953), 6 Wyo. L.J. 311 (1952).

PART TWO

Government Regulation and Taxation

FEDERAL INCOME TAXATION

HARRY J. RUDICK

ALTHOUGH 1954 is heralded as the year for major tax legislative revision,¹ a number of important technical amendments were embodied in the Technical Changes Act of 1953.² In addition, judicial decisions and Revenue Rulings continued to produce important changes and developments.

Several important organizational changes were also made during 1953. The Bureau of Internal Revenue was changed to the Internal Revenue Service. All rulings beginning with those in the 1953 Internal Revenue Bulletin are now designated as Revenue Rulings, the old distinction between General Counsel Memorandum (G.C.M.), Income Tax Ruling (I.T.), Mimeograph (Mimeo), Office Decision (O.D.) etc., being abolished.³ Moreover, the Internal Revenue Service plans to publish on a much more extensive scale than heretofore private rulings which affect taxpayers' basic rights or duties, or which will serve as precedents.⁴ 1953 also saw the issuance of the new Income Tax Regulations 118, replacing Regulations 111. While no changes of real substance were made in the new Regulations, most of the references to provisions applicable only to prior years are eliminated.

The important substantive legislative, administrative and judicial changes will be considered under the general headings that follow.

I

TAXABLE INCOME

Claim of Right.—*North American Oil Consolidated v. Burnet*⁵ established many years ago the doctrine that income received under a claim of right, without any restriction on its use, is income which

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¹ See Hearings Before Committee on Ways and Means on Forty Topics Pertaining to the General Revision of the Internal Revenue Code, 83d Cong., 1st Sess. (1953).

² Pub. L. No. 287, 83d Cong., 1st Sess. (Aug. 15, 1953), 67 Stat. 615 (1953).

³ Int. Rev. Mimeo No. 89 (1952).

⁴ Rev. Ruling 212, 1953 Int. Rev. Bull. No. 21 at 20 (1953).

⁵ 286 U.S. 417 (1932).

the taxpayer is required to return even though his right to retain the money will be contested either in the year of receipt or subsequently. Several cases arose in 1953 involving the application of this doctrine.

In *Healy v. Commissioner*⁶ the Supreme Court was faced with the question as to whether officer-stockholders who became liable as transferees for additional corporate taxes payable as a result of the disallowance of the excessive compensation paid to them by the corporation, could adjust their returns for the year the salaries were received by deducting from each salary the corporate tax subsequently paid by them.

The Court applied the claim-of-right doctrine and held that the entire compensation must be included in the officer-stockholders' income. Even though the taxpayers were declared constructive trustees and transferees in equity, a constructive trust having a retroactive existence in legal fiction cannot change the "readily realizable economic value" and "practical use and benefit" which the taxpayers enjoyed during a prior accounting period antecedent to the declaration of the constructive trust. Moreover, the salary was not subject to a restriction on its use even though all the facts giving rise to the disallowance of the corporate deductions and to the transferee liability were known at the time the sums were received. The corporation's returns might have passed through without audit or question. "A potential or dormant restriction . . . which depends upon the future application of rules of law to present facts, is not a restriction on use within the meaning of *North American Oil Co. v. Burnet*."

The *Healy* case should be compared with *Mutual Telephone Co. v. United States*.⁷ There a telephone company, beset with heavy demand for services, obtained permission from the Public Utilities Commission to increase installation charges as a means of discouraging demand. However, because no showing had been made that the increase was necessary, the Commission required the charges to be segregated in a special account to prevent their passage to the stockholders in the form of increased dividends. The ninth circuit held that the amounts were not includible under the claim-of-right doctrine because they were restricted as to their use.

In *Knight Newspapers v. Commissioner*⁸ the sixth circuit had held that dividends illegally declared by a subsidiary in favor of a parent and later rescinded should not be included in the parent's income because they were received by the parent as a constructive

⁶ 345 U.S. 278 (1953).

⁷ 204 F.2d 160 (9th Cir. 1953).

⁸ 143 F.2d 1007 (6th Cir. 1944).

trustee. In *Smyth v. Lesoine*,⁹ however, this decision was disapproved, and the doctrine that the subsequent impressment of a constructive trust in favor of someone else precludes the recipient from receiving the income under a claim of right was not applied.

Punitive Damages: Insider Profit under Section 16(b) of the Securities and Exchange Commission Act.—It has been stated that "*Eisner v. Macomber*¹⁰ dies a slow death."¹¹ The *Macomber* case promulgated the classic definition of income as "the gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through a sale or conversion of capital assets"¹² Applying the *Macomber* definition of income, the Tax Court in *Glenshaw Glass Company*¹³ held that punitive damages received under the federal antitrust laws are not taxable income. Shortly after the *Glenshaw* decision, the Court of Claims in *Park & Tilford Distilleries Corporation v. United States*¹⁴ and the Tax Court in *General American Investors Company*¹⁵ held that insider's profits turned over to the taxpayer corporation in accordance with the provisions of the SEC Act¹⁶ were income to the corporation under the "any source whatever" phrase of Section 22(a). The punitive damages cases were distinguished merely on the ground that insider's profits were not punitive damages.

In *William Goldman Theaters, Inc.*¹⁷ and in *Obear Nester Glass Co.*¹⁸ the Tax Court was again presented with the question as to whether treble damages under the antitrust laws were includible in the gross income of the recipient. The court refused to hold that the vitality of *Eisner v. Macomber* was sapped by the SEC cases and following the *Glenshaw* case held that two-thirds of the recovered damages should be excluded from gross income as punitive damages.

The cases dealing with punitive damages and the cases dealing with insider's profits seem at first blush inconsistent. Yet the distinction could be rationalized if the courts would hold—as they should but have not yet done¹⁹—that the insider obtained a deduction when

⁹ 4 P-H 1953 Fed. Tax. Serv. ¶ 72,416 (1953).

¹⁰ 252 U.S. 189, 207 (1920).

¹¹ Douglas, J., dissenting in *Helvering v. Griffiths*, 318 U.S. 371, 404 (1943).

¹² 252 U.S. 189, 207 (1920).

¹³ 18 T.C. 860 (1952).

¹⁴ 107 F.Supp. 941 (Ct. Cl. 1952).

¹⁵ 19 T.C. 581 (1952).

¹⁶ SEC Act of 1934, § 16(b), 48 Stat. 896 (1934), 15 U.S.C. § 78(p)(b) (1946).

¹⁷ 19 T.C. 637 (1953).

¹⁸ 20 T.C. No. 152 (1953).

¹⁹ In *William F. Davis, Jr.*, 17 T.C. 549 (1952) the court disallowed a deduction for insider profits paid over to a corporation by a director. There are numerous instances where income taxed to the recipient is not deductible by the payer. For example,

he turned over the profit to the corporation; for in that case, the profit will escape tax altogether if it is not taxed to the corporation. Punitive damages on the other hand are not profits and would clearly be nondeductible by the payor.

Disability Payments in Excess of Workmen's Compensation.—The Internal Revenue Service is continuing its strict application of Section 22(b)(5). Last year the Bureau ruled that employees must include in their income and employers must withhold taxes on payments paid for nonoccupational disability pursuant to an approved plan of self-insurance under the California, New Jersey and New York disability insurance laws unless such plan is "itself a plan of insurance."²⁰ Because the ruling prescribed no tests for the necessary plan, its practical result was to require most self-insured employers to begin withholding income tax on their disability payments.

This year, Revenue Ruling 103²¹ holds that disability benefits paid to an employee under a contractual arrangement in excess of workmen's compensation, and in excess of the amount the employee could recover in a tort action are beyond the exclusion from gross income provided by Section 22(b)(5).²² An earlier ruling²³ holding that payments to an injured employee under a plan whereby the employee elected to reject workmen's compensation benefits in lieu of the more liberal benefits provided by the employer were excludable from gross income under Section 22(b)(5) as an amount of damages received by suit or agreement on account of injury or sickness is revoked. The ruling properly requires amounts in excess of what the employee could legally recover for his damages to be treated as taxable compensation.

Annuity Payments.—In prescribing the taxation of annuity payments, Section 22(b)(2) provides that annuity payments are taxable as ordinary income only to the extent of 3 per cent of the consideration paid for the annuity until the aggregate amount excluded equals the consideration, whereupon the entire amount of the annuity is taxed at ordinary income rates. A great deal of confusion has existed concerning the application of this 3 per cent rule where appreciated property is transferred in return for a lifetime annuity.

In *Estate of Bertha F. Kann*²⁴ appreciated property was trans-

unreasonable compensation must be included in the gross income of the employee although it is not deductible by the employer.

²⁰ I.T. 4107, 1952-2 Cum. Bull. 73.

²¹ 1953-1 Cum. Bull. 20.

²² Section 22(b)(5) provides for the exclusion from gross income of "amounts received through accidents or health insurance or under workmen's compensation for personal injuries or sickness, plus the amount of any damages received whether by suit or agreement on account of such injuries or sickness. . . ."

²³ I.T. 3306, 1939-2 Cum. Bull. 149.

²⁴ P-H 1947 TC Mem. Dec. ¶ 47,226 (1947).

ferred to the transferor's children in exchange for their promise to pay the transferor a lifetime annuity. The court held that no gain was realized on the transfer since a promise to pay an annual annuity by an individual had no fair market value. The court, however, did not decide whether the annuity payments should be nontaxable until the transferor had first recovered her basis for the property transferred or whether a portion of each annuity payment should be taxed as ordinary income under the 3 per cent rule until the untaxed amounts equaled the basis for the property transferred, whereupon a portion of each annuity payment would be taxed as ordinary income and a portion as gain realized in respect of the property transferred until the entire amount of gain realized had been taxed.

Revenue Ruling 239²⁵ now dispels—at least administratively—the confusion existing in this area. Under this ruling, where appreciated property is transferred in return for an annuity, the annuitant's cost, for the purpose of the 3 per cent rule, is considered the fair market value of the property transferred. Hence, the amount of the annuity received to the extent of 3 per cent of that fair market value is taxable as ordinary income. When the total amount of the excluded portion of the annuity payments received exceeds the transferor's basis for the property transferred, the annuitant must still include in his ordinary income that portion of each annuity payment equal to 3 per cent of the fair market value of the property transferred, but the remainder of the annuity payment is taxed as gain, capital or ordinary, as the case may be, until the amount so taxed equals the difference between the fair market value and the basis of the property initially transferred. When the full amount of the gain realized on the transfer is taxed, the annuitant continues to be taxed at ordinary rates on each annuity payment up to 3 per cent of the fair market value of the transferred property until the amounts excluded equal the fair market value, after which the entire annuity payments become taxable as ordinary income.

II

TO WHOM TAXABLE

Clifford Regulations.—Perhaps the most important decision this year concerning the allocation of income among related taxpayers is the seventh circuit case of *Commissioner v. Clark*²⁶ holding the Clifford regulations²⁷ to be unconstitutional, at least in part. The *Clifford* case²⁸ had held that the grantor was taxable on the income of a five-

²⁵ 1953 Int. Rev. Bull. No. 23 at 4 (1953).

²⁶ 202 F.2d 94 (7th Cir. 1953).

²⁷ U.S. Treas. Reg. 111, § 29.22(a)-21 (1945).

²⁸ *Helvering v. Clifford*, 309 U.S. 331 (1940).

year spendthrift trust created in favor of his wife, where on the termination of the trust the corpus was to revert to the grantor and in addition, the grantor retained both the right to determine when the net income of the trust should be paid over to his wife and full power over the administration of the trust corpus. In the Court's view the bundle of rights retained by the grantor was so substantial that for the purpose of Section 22(a) he was to all intents and purposes the owner of the corpus and hence taxable on the income. The Court's statement, however, that "no one fact is normally decisive" rendered uncertain the tax status of short term irrevocable trusts lacking one or more of the *Clifford* factors. To dispel the uncertainty and confusion spawned by ensuing lower court decisions,²⁹ the Treasury in 1945 issued the famous Clifford regulations. Under these regulations the grantor was taxed under Section 22(a) on trust income, where he retained a reversionary interest and the trust term was less than ten years. The regulation, however, did not indicate whether it was to apply to the income of trusts created before January 1, 1946.

In *Commissioner v. Clark* the taxpayer in 1941 had deeded securities to a local charitable foundation for a term of five years. A year later the term was extended to run four more years to 1951. The trust income to the extent that it exceeded the settlor's allowable charitable deduction was taxed to the settlor for the year 1946.³⁰ The Tax Court held that neither the *Clifford* doctrine nor the Clifford regulation was applicable to charitable trusts.³¹ On appeal the seventh circuit ignored the narrow basis of the Tax Court's decision and held (1) that the regulation could not be applied retroactively to the trust already in existence, (2) that the trust term was not nine but ten years, and (3) that the regulation was an unconstitutional violation of due process in that it created an irrebuttable presumption that the grantor of a short term trust with the reversionary interest in the settlor was the owner of the trust property under Section 22(a).

The seventh circuit's holding that the irrebuttable presumption created by the Clifford regulations is unconstitutional can be dismissed as dicta for there were ample other grounds for decision in favor of the taxpayer. The court could have rested its decision on the point that the Clifford regulations did not apply to trusts created before January 1, 1946,³² and that under the case law decisions based on the

²⁹ For a summary of these decisions see Surrey & Warren, *Federal Income Taxation, Cases and Materials* (1953).

³⁰ The Commissioner conceded that the settlor was not taxable for 1944 and 1945 which were years not covered by the regulations.

³¹ *Ruth S. Clark*, 17 T.C. 1357 (1952).

³² But see *Kay v. Commissioner*, 178 F.2d 772 (3d Cir. 1950); *Shapero v. Commissioner*, 165 F.2d 811 (6th Cir. 1948) (Clifford regulations applied to trust created before Jan. 1, 1946).

"bundle of rights" theory, the grantor of a short term charitable trust who retains no administrative control should not be taxed.³³ Or the court could have based its decision on the holding that the regulations themselves could not reasonably apply to a short term charitable trust where the grantor retained no administrative control. But the court's holding that due process would be denied even if Congress enacted a ruling creating the conclusive presumption found in the Clifford regulations goes too far. The court's reliance on the case of *Heiner v. Donnan*³⁴ is questionable. In that case the Court struck down a conclusive presumption that all gifts within a certain period prior to death were deemed to be made in contemplation of death. But there a state of mind was inferred from the subsequent occurrence of an unpredictable event, whereas in the challenged Clifford regulations, ownership is presumed on the basis of the terms of a trust deed. Furthermore, the Supreme Court in *Clifford* admitted that it was forced to scrutinize all the circumstances "in the absence of more precise standards or guides supplied by statute or appropriate regulations."³⁵ And the Supreme Court in *Harrison v. Schaffner*³⁶ reiterated the plea for a nonjudicial statement of the *Clifford* doctrine. It is doubtful that other courts will hold this presumption unconstitutional when faced with facts that more reasonably can be found to warrant a finding that the settlor under Section 22(a) is the owner of the trust property. Although the Commissioner has not applied for certiorari in the *Clark* case, the Clifford regulations have been approved by other circuits³⁷ and probably the Supreme Court will ultimately be called upon to settle the question as to the constitutionality of these regulations.

In connection with the application of the Clifford regulations to short-term charitable trusts, it is interesting to note that Revenue Ruling 194³⁸ holds that a charitable deduction may be taken for an irrevocable transfer of trust income for a period of ten years and ten days to a qualifying charity. At least with respect to charitable trusts that are longer than ten years, the Treasury recognizes that the grantor is not the owner of the corpus.

Corporate Distribution of Assets Followed by Sale by Shareholders.—The movement of the courts away from the *Court Holding* doctrine³⁹ since the case of *United States v. Cumberland Public Service*

³³ *Helvering v. Bok*, 132 F.2d 365 (3d Cir. 1942); *Commissioner v. Chamberlin*, 121 F.2d 765 (2d Cir. 1941); *Helvering v. Achelis*, 112 F.2d 929 (2d Cir. 1940).

³⁴ 285 U.S. 312 (1932).

³⁵ 309 U.S. 331, 334-35 (1940). (Emphasis supplied.)

³⁶ 312 U.S. 579, 583 (1941).

³⁷ See note 32 *supra*.

³⁸ 1953 Int. Rev. Bull. No. 20 at 2 (1953).

³⁹ *Commissioner v. Court Holding Co.*, 324 U.S. 331 (1945).

*Co.*⁴⁰ is amply illustrated by two recent cases. In *Burley Tobacco Warehouse v. Glenn*,⁴¹ after the shareholders decided to dissolve the corporation, a contract to sell the corporation's sole asset was negotiated. Payment was made by check made out to and endorsed by the corporation. Formal dissolution of the corporation did not occur until the following year. Despite testimony by the purchasers that they understood that they were dealing with the corporation and not with the shareholders, the court held that a sale by the corporation was not intended in view of the fact that the decision to liquidate was made prior to the contract of sale. Thus the corporation was not taxed on the gain from the sale under the *Court Holding* doctrine. This case goes further than most of the decided cases thus far dealing with the problem and is not easy to distinguish from other cases applying the *Court Holding* doctrine where the corporation was actually a party to the contract of sale.⁴²

The cases of *United States v. Horschel*⁴³ and *Gensenger v. Commissioner*⁴⁴ also illustrate the new liberal attitude of the courts. In the *Horschel* case corporate inventory (apples) was placed in a corporate warehouse under a pooling arrangement prior to the corporation's liquidation. In the *Gensenger* case peaches and apricots were transferred to a marketing co-operative prior to dissolution. In both cases the fruit was sold following dissolution and the profits were distributed to the shareholders. The ninth circuit in both cases held that the corporation in question was not liable to tax on the gain realized on the sale of the fruit. The decisions were based on the fact that before the consummation of the sale, the shareholders had received an interest in the property sold, and not merely an interest in the profits. These cases also go further than other cases dealing with this type of situation. In *United States v. Lynch*,⁴⁵ for example, the ninth circuit held that the corporation should be taxed on the gain from the sale by the shareholders of a dividend in kind of apples. The *Lynch* case was distinguished by the court in *Horschel* on the ground that different principles applied where a dividend distribution of inventory is made by a going concern, and where such a distribution is made pursuant to the complete liquidation of the corporation.

Alimony Payments.—Under Section 22(k) and 23(u) alimony is income to the wife and deductible by the husband only if the payments are periodic, but installment payments of a specified principal sum to

⁴⁰ 338 U.S. 451 (1950).

⁴¹ 106 F. Supp. 949 (W.D. Ky. 1952).

⁴² See, e.g., *Jones v. Grinnell*, 179 F.2d 873 (10th Cir. 1950).

⁴³ 205 F.2d 646 (9th Cir. 1953).

⁴⁴ 4 P-H 1953 Fed. Tax. Serv. ¶ 72,816 (9th Cir. 1953).

⁴⁵ 192 F.2d 718 (9th Cir. 1951).

be made within ten years are not considered as periodic. The second and third circuit courts this year had occasion to interpret the meaning of periodic payments.

In *Baker v. Commissioner*⁴⁶ the taxpayer under a separation agreement was to pay his wife \$600 a month from September 1, 1946 to August 31, 1947, and \$200 a month from September 1, 1947 to August 31, 1952; but if she should die or remarry, his obligation to make any such payments would cease. The court held that because the payments were to stop on the contingency of remarriage, they were not installment payments of a sum certain but rather were periodic payments deductible by the husband and includible in the wife's gross income. This conclusion was reached on the ground that the likelihood of remarriage, depending as it did upon events solely within the wife's choosing, was so unpredictable as to make valuation of the total payments to be made actuarially impossible. This case rejects the reasoning of the leading Tax Court case in this area,⁴⁷ and the use of actuarial tables to calculate the possibility of remarriage.⁴⁸ While consistent with a literal interpretation of Section 22(k), the decision does not take sufficient cognizance of the policy reasons for not allowing a husband a deduction for installment payments of a principal sum. These are to prevent the bunching of large deductions into periods of high income and to avoid depletion of a principal sum the income of which is meant to provide future maintenance for the wife.

The *Baker* case should be compared with the third circuit's decision in *Estate of Frank Charles Smith v. Commissioner*.⁴⁹ In the *Smith* case, the husband was to pay his wife \$25,000 in ten equal semiannual installments and, in addition, was to pay his wife \$300 a month for a period of five years. These payments, however, were to cease upon the wife's death or remarriage. The third circuit held that the installment payments of the \$25,000 were not periodic payments that were deductible by the husband. On the other hand, the court followed the *Baker* case and held that the \$300 monthly payments payable over a five-year period were periodic payments deductible by the husband in view of the defeating contingency of remarriage. From these cases, it may be deduced that relatively small monthly payments will be treated as periodic where they are subject to a contingency, but large sums will not.

⁴⁶ 205 F.2d 369, 4 P-H 1953 Fed. Tax. Serv. ¶ 72,588 (2d Cir. 1953).

⁴⁷ J. B. Steinel, 10 T.C. 409 (1948).

⁴⁸ See *Pompeo M. Maresi*, 6 T.C. 582, aff'd, 156 F.2d 929 (2d Cir. 1946) (actuarial tables calculating the possibility of remarriage used in order to value deduction from gross estate of legal claim for payments to be made to wife).

⁴⁹ 4 P-H 1953 Fed. Tax. Serv. ¶ 72,776 (3d Cir. 1953).

Corporate Distributions and Reorganization: (a) Stock Dividends.—The *Eisner v. Macomber* case⁵⁰ is best known for its holding that a common stock dividend issued on common is not taxable income.⁵¹ But, under *Koshland v. Helvering*,⁵² stock dividends are taxable where "a stock dividend gives the stockholder an interest different from that which his former stock holdings represented."⁵³

Applying the proportionate interest test the Supreme Court has held that where both classes of stock are outstanding, a distribution of common on preferred⁵⁴ or preferred on common⁵⁵ is taxable; whereas a distribution of preferred on common with only common outstanding and but a single stockholder is not taxable.⁵⁶

As noted in this space last year, the lower courts have had much difficulty in applying this test. In *Edwin L. Wiegand*⁵⁷ a corporation having both class A and class B stock outstanding issued a stock dividend of one-half share of class A for each share of class A and a one-half share of class B for each share of class B. The Tax Court held that there was a change in the interest formerly represented by the class A and class B shares and held the dividend taxable. A stockholder owning the same percentage of class A and class B at the time of the dividend's declaration appealed the Tax Court's decision, asserting that his proportionate interest in the corporation had not been affected in any way by the distribution. The seventh circuit in *Tourtellot v. Commissioner*⁵⁸ agreed and reversed the Tax Court with respect to him. Other stockholders, including Wiegand, who had owned different percentages of class A or class B, or who had held stock in only one or the other class, also appealed the Tax Court's decision. In *Wiegand v. Commissioner*⁵⁹ the third circuit, regarding the stockholders as a group rather than as individuals and observing that the proportionate interest of the entire group of A and the entire group of B stockholders remained the same after distribution, reversed the Tax Court and held that the entire distribution was tax free. Thus the incongruous result of taxing some shareholders and not others was avoided.

The recent case of *John A. Messer, Sr.*⁶⁰ indicates that the

⁵⁰ 252 U.S. 189 (1920).

⁵¹ See also *Helvering v. Griffiths*, 318 U.S. 371 (1943).

⁵² 298 U.S. 441 (1936).

⁵³ *Id.* at 446.

⁵⁴ *Koshland v. Helvering*, 298 U.S. 441 (1936).

⁵⁵ *Helvering v. Gowran*, 302 U.S. 238 (1937).

⁵⁶ *Strassburger v. Commissioner*, 318 U.S. 604 (1943).

⁵⁷ 14 T.C. 136 (1950).

⁵⁸ 189 F.2d 167 (7th Cir. 1951).

⁵⁹ 194 F.2d 479 (3d Cir. 1952).

⁶⁰ 20 T.C. 264 (1953).

Tax Court may not follow the *Wiegand* appellate decision. In the *Messer* case, a corporation had outstanding both common and preferred stock. All of the common shareholders owned preferred stock but not all the preferred shareholders owned common stock. Some of the preferred stock was redeemed and distributed to the other preferred shareholders. The Commissioner asserted that a shareholder who owned 71.7 per cent of the outstanding common and 15.9 per cent of the outstanding preferred before the distribution, received a taxable dividend. The Tax Court sustained the Commissioner, holding that the shareholder's receipt of the preferred stock dividend gave him greater rights and increased his percentage of ownership. While the court did not state whether or not it would adhere to its decision in the *Wiegand* case, it distinguished that case on the ground that there stock dividends were paid on both classes of stock in the same percentages, with each group obtaining the same interest vis-a-vis the other group as they had prior to distribution.

The court in the *Messer* case gave an additional reason for holding the stock dividend taxable. Referring to its own decision in *C. P. Chamberlin*,⁶¹ the court pointed out that the preferred stock dividend had shortly before been redeemed from earnings and profits. Had the proceeds used to redeem the preferred stock been distributed instead to the shareholders, it would have been a taxable dividend notwithstanding that the recipients might then have purchased the preferred stock directly with the proceeds of such distribution. The effect of the transaction on the value of the common stock would be the same if redemption of stock with earnings and profits was followed by a dividend distribution of the redeemed stock or if a corporate distribution of earnings and profits was followed by a shareholder purchase of that stock.

Similar reasoning led the Tax Court, in the case of *Joseph Schmitt*,⁶² to hold a stock dividend of treasury common stock issued on common taxable where the stock distributed had been purchased by the corporation from earnings and profits for the sole purpose of subsequent distribution to the stockholders.

Whether the second ground of decision in the *Messer* case and the holding in *Schmitt* will stand up in view of the reversal of the Tax Court's decision in the *Chamberlin* case by the sixth circuit is doubtful.⁶³

In the *Chamberlin* case a preferred stock dividend, providing

⁶¹ 18 T.C. 164 (1952).

⁶² 20 T.C. No. 44 (1953).

⁶³ *Chamberlin v. Commissioner*, 4 P-H 1953 Fed. Tax Serv. ¶ 72,725 (6th Cir. 1953).

for redemption over a period of eight years, was distributed to common stockholders, and pursuant to a prearranged plan was then sold by them to two insurance companies. The Commissioner asserted that the preferred stock "bail-out" was essentially the same as an ordinary dividend distribution of cash, and the Tax Court, looking to the substance of the transaction, agreed. As an afterthought, the Tax Court also held that the sale changed the common stockholders' pre-existing proportionate interests in the corporation.

In reversing, the sixth circuit pointed out that the proportionate interest test is to be applied as of the time of the distribution and not in the light of subsequent events. Under *Strassburger v. Commissioner* the receipt of a preferred stock dividend on common, common being the only stock outstanding, does not change the proportionate interests of the stockholders. Therefore, the stock dividend is not a taxable dividend. Moreover, the court held that the lack of a business purpose and the admitted tax avoidance motivation for the transaction did not affect the nontaxability of the dividend. Finally the redemption feature of the stock did not require the distribution to be characterized as a cash distribution by the corporation in the absence of a finding that all of the stock was redeemed immediately or shortly after its distribution.

This decision deals a major blow to the Treasury's contention that preferred stock dividend "bail-outs" result in a taxable dividend, and also casts doubt on the alternative holding in *Messer* and the decision in *Joseph Schmitt*.

(b) *Dividends in Kind*.—A new attack by the Commissioner on the doctrine that a corporation does not realize gain upon its distribution of appreciated property as a dividend⁸⁴ was defeated in the Tax Court case of the *Estate of Ida S. Godley*.⁸⁵ In that case, a corporation, having accumulated earnings and profits of approximately \$5,600,000 available for dividends, distributed as dividends cash of approximately \$2,000,000 and stock of another corporation having a cost basis of approximately \$3,000,000 and a fair market value of approximately \$9,000,000. The Commissioner asserted that the property distribution was taxable as a dividend to the extent of its fair market value, while the shareholders contended that the value of the distribution in excess of \$5,600,000 was a return of capital. The Commissioner obliquely attacked the *General Utilities*⁸⁶ doctrine by arguing that once a property is purchased by a corporation out of earnings and profits it continues to represent statutory earnings or

⁸⁴ *General Utilities Co. v. Helvering*, 296 U.S. 200 (1935).

⁸⁵ 19 T.C. 1082 (1953).

⁸⁶ *General Utilities Co. v. Helvering*, 296 U.S. 200 (1935).

profits, and if distributed constitutes a "dividend" under Section 115(a) to the extent of its full value, citing Section 115(j) which provides that a dividend in kind shall be valued at its fair market value at the time of the distribution. This theory in essence was applied by the sixth circuit in *Commissioner v. Wakefield*⁶⁷ and was rejected by the Tax Court in *Jane Easton Bradley*.⁶⁸ The Tax Court in the *Godley* case once again rejects this argument, pointing out that the Commissioner's theory carried to its logical conclusion would require ordinary dividend treatment to the extent of the fair market value of dividends in kind even though the statutory earnings and profits of the corporation at the time of the distribution are zero or a deficit. Section 115(j) does not establish an independent measure of taxability but is merely a valuation provision which is meaningless considered independently of Sections 115(a) and (b) which alone define a dividend. Under these subsections a dividend is distributed out of earnings and profits only to the extent thereof at the time of the distribution. To the extent that the fair market value of the property distribution is not covered by the earnings and profits existing at the time of distribution the excess is merely a return of capital. Parenthetically it may be added that frequently it would be impossible from a practical viewpoint to say whether a particular asset has been acquired out of earnings or out of capital.

Despite the strong opinion of the Tax Court in the *Godley* case, the Commissioner is preparing to attack further the *General Utilities* doctrine on other grounds and the end of this problem is not yet in sight. Apparently, the Commissioner is looking for a conflict among the circuit courts that will enable him to relitigate the issue before the Supreme Court, in the hope that the new membership of the Court might reverse the doctrine pronounced in their *General Utilities* case.

(c) *Redemptions under Section 115(g)*.—The regulations under Section 115(g) provide that "a cancellation or redemption by a corporation of all of the stock of a particular shareholder so that the shareholder ceases to be interested in the affairs of the corporation, does not effect a distribution of a taxable dividend."⁶⁹ The rationale underlying this regulation is that a stock redemption is equivalent to a distribution of a taxable dividend only where the shareholder continues to own an interest in the corporation after the redemption. Where all of a shareholder's stock is redeemed, the liquidating distribution cannot be treated as a dividend distribution of earnings and profits because such a redemption is no different from a sale

⁶⁷ 139 F.2d 280 (6th Cir. 1943).

⁶⁸ 9 T.C. 115 (1947).

⁶⁹ U.S. Treas. Reg. 118, § 39.115(g)-1(a)(2) (1953).

of stock to a third party which, of course, results in capital gain treatment. This rationale was recently applied by the fourth circuit in *Commissioner v. Roberts*.⁷⁰ In that case, two brothers each owned 500 shares of stock of the corporation. Upon the death of one of the brothers the other inherited the decedent's stock. The corporation then redeemed the 500 shares that were inherited. The Tax Court⁷¹ held that the above-quoted regulation applied since the distribution was in complete cancellation and redemption of all of one stockholder's (the deceased brother's) stock and therefore that Section 115(g) was inapplicable. The fourth circuit, reversing, pointed out that the surviving brother, who was now the sole stockholder in the corporation, received the equivalent of a taxable dividend since after the distribution his interest in the corporation was exactly the same as it was before the distribution. Therefore the regulation did not apply.

(d) *Recapitalizations and Split-Off Reorganizations.*—Under the doctrine of *Bazley v. Commissioner*⁷² a distribution pursuant to a split-off reorganization or recapitalization under Sections 112(b)(3) and 112(g)(1)(D) or (E) may be treated as a dividend distribution under Section 115(g), where the net effect of the distribution is to distribute earnings and profits, *i.e.*, if absent the tax-free reorganization sections, Section 115(g) would be applicable. Thus in *Rufus Riddlesbarger*,⁷³ where a drug corporation having purchased a ranch with accumulated earnings and profits, transferred the ranch to a new realty corporation in exchange for the stock of the realty corporation which it then distributed to shareholders in exchange for part of the shareholders' stock in the drug corporation, the Tax Court held the distribution of realty stock taxable as a dividend. Despite literal compliance of the distribution with Sections 112(b)(3) and 112(g)(1)(D), the net effect of the distribution of the realty stock was to distribute earnings and profits and therefore the distribution of that stock was taxable as a dividend under Section 115(g). This case has now been reversed by the seventh circuit.⁷⁴

In reversing, the seventh circuit pointed out that while a distribution of debenture bonds and common for common in a recapitalization⁷⁵ may be equivalent to a cash dividend, a distribution of stock in a new corporation that does not disturb the proportionate interest of the shareholders is not. This pronouncement, together with the sixth circuit's reversal of the Tax Court in the *Chamberlin* case, virtually

⁷⁰ 203 F.2d 304, 4 P-H 1953 Fed. Tax. Serv. ¶ 72,461 (4th Cir. 1953).

⁷¹ 17 T.C. 1415 (1952).

⁷² 331 U.S. 737 (1947).

⁷³ 16 T.C. 820 (1951).

⁷⁴ 200 F.2d 165 (7th Cir. 1952).

⁷⁵ See *Bazley v. Commissioner*, 331 U.S. 737 (1947).

emasculates the doctrine that a stock distribution will be treated as a dividend if the shareholders, upon selling the distributed stock could realize the equivalent of a distribution of earnings and profits. But one may question whether this would have been the basis of decision had the ranch been spun off under Section 112(b)(11), *i.e.*, had the stock in the realty corporation been distributed to the drug corporation's shareholders without their turning in any of their stock in the drug corporation. Under Section 112(b)(11)(B) such a distribution could be accorded tax-free status under the reorganization sections only if the stock distribution is not used "principally as a device for the distribution of earnings and profits to the shareholders. . . ." This limitation clearly envisages that there may be situations where a distribution of stock in a new corporation is essentially equivalent to the distribution of a dividend. If the *Chamberlin*⁷⁶ and *Riddlesbarger* cases are good law, an actual plan of sale or an actual sale would probably now have to be shown before the Commissioner could invoke this limitation of Section 112(b)(11).

It should be noted that the realty stock in *Riddlesbarger* was not sold until four years after the distribution. A less far-reaching ground of decision in the case is the rule that a distribution impelled by a contraction of business not only precludes application of Section 115(g)⁷⁷ but also establishes a business purpose for a reorganization.

The case of *Davis v. Penfield*⁷⁸ also bears on this general problem. In that case 7 per cent cumulative preferred stock was surrendered in exchange for 7 per cent five-year debentures in a recapitalization of a corporation which had both the preferred and common stock outstanding. The debentures were distributed in proportion to the preferred stockholdings. Some of the recipients, including the taxpayer, held disproportionate amounts of common and preferred; others held no common stock.

The court held the distribution of debentures did not give rise to a dividend under Section 115(g) under the *Bazley* case, but was a tax-free exchange of securities under the reorganization provisions. This case does not depart from the rationale of the *Bazley* case. As the court pointed out, the debentures received could not be treated as a dividend because they were not distributed in proportion to the common stock and therefore did not relate to a class of stock continuing in existence and not exhausted by the conversion. Moreover,

⁷⁶ *Chamberlin v. Commissioner*, 4 P-H Fed. Tax Serv. ¶ 74,451 (T.C. 1953).

⁷⁷ See *Commissioner v. Quackenbos*, 78 F.2d 156 (2d Cir. 1935); *John L. Sullivan*, 17 T.C. 1420 (1952); *Joseph W. Imler*, 11 T.C. 836 (1948); *L. M. Lockhart*, 8 T.C. 436 (1947).

⁷⁸ 205 F.2d 798 (5th Cir. 1953), affirming *Penfield v. Davis*, 105 F. Supp. 292 (N.D. Ala. 1952).

since the debentures received were no more readily marketable than the preferred stock turned in, the shareholders did not obtain any "bail-out" mechanism which they did not already possess.

(e) *Acquisitions of Stock to Acquire Underlying Assets*.—Since the decision in *Kimbell-Diamond Milling Co.*⁷⁰ corporate taxpayers who purchase the stock of a corporation in order to acquire the appreciated assets of the purchased corporation have contended that upon liquidation of the purchased corporation Sections 112(b)(6) and 113(a)(15) do not apply. Therefore, the basis of the assets in the acquiring corporation's hands would become the purchase price paid for the stock and not the basis of the assets in the hands of the purchased corporation. Revenue agents, on the other hand, have contended that the tax-free sections apply and that basis carries over.

The case of *Kanawha Gas & Utilities Co.*⁸⁰ holds the *Kimbell-Diamond* doctrine to be inapplicable where prior to the liquidation the acquiring corporation and the purchased subsidiary filed consolidated returns. By the filing of consolidated returns the corporations submit to the consolidated return regulations⁸¹ which provide that the basis shall carry over where a corporation liquidates one of the members of an affiliated group. This case is now being appealed to the fifth circuit.

Two other cases involving the *Kimbell-Diamond* doctrine were also decided this year. In both, the purchaser of the stock had paid less for the stock than the value of the assets received, and upon liquidation of the acquired corporation the Commissioner contended that gain was realized and should be recognized.

In the *H. B. Snively*⁸² case the purchaser of stock, an individual, was held not to have realized any gain on the liquidation because he had in actuality purchased the assets and not the stock of the corporation. This case not only establishes that the *Kimbell-Diamond* doctrine may be used by an individual,⁸³ but that it will be applied when the taxpayer as well as the Government invokes it.

In *Distributor's Finance Corporation*,⁸⁴ where the purchaser was a corporation, the Commissioner had contended that under the *Kim-*

⁷⁰ 14 T.C. 74 (1950), aff'd, 187 F.2d 718 (5th Cir. 1951) (where acquired corporation's basis for assets subsequently acquired on liquidation was greater than purchase price for stock, basis for determining loss on subsequent sale was purchase price of stock and not subsidiary's basis).

⁸⁰ 19 T.C. 1017 (1953).

⁸¹ U.S. Treas. Reg. 129, § 24.38(c)(2) (1951).

⁸² *H. B. Snively*, 19 T.C. 850 (1953).

⁸³ See *Ruth Cullen*, 14 T.C. 368 (1950) (where individual acquired stock at a cost greater than fair market value of assets of acquired corporation, no loss allowed on liquidation of corporation).

⁸⁴ 20 T.C. No. 111 (1953)

bell-Diamond doctrine, Section 112(b)(6) was inapplicable and that gain should be recognized on the liquidation. If Section 112(b)(6) applied, the gain realized on the transaction would never be taxed since the carried-over basis of the assets of the acquired corporation had no relation to the purchaser's cost for his stock. The court nevertheless held that because the plan to liquidate was conceived subsequent to the stock acquisition, Section 112(b)(6) was applicable and gain was not recognized.

A strict application of the *Kimbell-Diamond* rule in this case, however, would have prevented the escape from taxation of the gain realized, and at the same time the liquidation would not have been the occasion for the recognition of the gain. Instead, the taxpayer's basis for the assets of the acquired corporation would have been the purchase price paid for the stock and upon selling of those assets the taxpayer-corporation would have recognized a gain equal to the difference between that purchase price and the fair market value of the assets. But the court, by examining into the intent of the purchaser at the time of the stock acquisition and ignoring the subsequent events, now casts doubt upon the vitality of the *Kimbell-Diamond* doctrine.

(f) *Liquidations under Section 112(b)(7)*.—Under Section 112(b)(7) an election is provided whereby gain on the liquidation of a corporation may be postponed provided that the shareholders include in their ordinary income their allocable share of the corporation's earnings and profits. This section has been enacted intermittently into the Code for short periods of time.

Under the former provision the section applied to liquidations occurring within one month in 1951 and 1952 provided that the plan of liquidation was adopted after December 31, 1950. Section 101 of the Technical Changes Act of 1953⁸⁸ extends the applicability of this section to liquidations occurring during 1953.

Under the provisions of this section, an election once made cannot be subsequently revoked. In *Meyer's Estate v. Commissioner*⁸⁹ the shareholders of the corporation had elected to be governed under Section 112(b)(7) at a time when they assumed that the earnings and profits of the corporation were much less than was the true amount of earnings and profits subsequently determined on audit by the Commissioner. The Tax Court refused the petition of the shareholders to withdraw their previous election and be taxed under Section 112(c). The fifth circuit, however, reversed the Tax Court, holding that where an electing taxpayer relied in good faith upon understated earned

⁸⁸ Pub. L. No. 287, 83d Cong., 1st Sess. (Aug. 15, 1953), 67 Stat. 615 (1953).

⁸⁹ 200 F.2d 592 (5th Cir. 1952).

surplus, the bona fide mistake of the fact justified the withdrawing of the election.

III

CAPITAL GAINS AND LOSSES

Sale or Exchange of Intangible Assets.—It has been held that the consideration for a covenant not to compete is not taxable as ordinary income when it is received in connection with the sale of good will and a going business.⁸⁷ Instead, the entire transaction is treated as a sale of good will, a capital asset. But where a covenant not to compete is separately bargained and paid for, the consideration received will be taxed as ordinary income.⁸⁸ This latter rule was applied in *Clarence Clark Hamlin Trust*,⁸⁹ where a seller of a corporation's stock also gave the purchaser his covenant not to compete and where the amount of the consideration for the covenant was recited in the contract of sale. The consideration for the covenant not to compete was taxed as ordinary gain since there was no sale or exchange of a capital asset. The court's emphasis on the recital in the contract as to the amount paid for the covenant points to another problem which may arise between a buyer and seller on the sale of a going business. The purchaser will want to allocate part of the purchase price to the covenant since such a covenant is amortizable while good will is not a depreciable asset.⁹⁰ The seller, of course, will want the whole amount allocated to good will so that he can obtain capital gain treatment. It seems unrealistic to view a covenant not to compete as something other than a sale of good will since in the usual case the seller's forbearance from competition is a major component of the purchased good will.

Another chapter in the taxation of intangible assets was written by the second circuit's decision in *Commissioner v. Starr*,⁹¹ holding that a payment received for the release of an exclusive agency contract involved no sale or exchange and was therefore taxable as ordinary gain. This decision seems inconsistent with *McCue Bros. and Drummond, Inc. v. Commissioner*⁹² and *Commissioner v. Golonsky*,⁹³ which hold that capital gain results when a lessee receives payments to surrender his lease. Perhaps the lease cases may be distinguished on the ground that the right to the possession of the properties is more

⁸⁷ Aaron Michaels, 12 T.C. 17 (1949); Toledo Newspaper Co., 2 T.C. 794 (1943).

⁸⁸ Rodney B. Horton, 13 T.C. 143 (1949).

⁸⁹ 19 T.C. 718 (1953).

⁹⁰ Harold J. Burke, 18 T.C. 77 (1952); U.S. Treas. Reg. 118, Section 39.23(1)-3 (1953).

⁹¹ 204 F.2d 673 (2d Cir. 1953).

⁹² 19 T.C. 667 (1953).

⁹³ 200 F.2d 72 (3d Cir. 1952).

of an in rem property interest than the personal right not to have competition or the personal right to the exclusive sale of products. But the second circuit, in *Starr*, did not indicate whether it would follow the third circuit's decision in *Golonsky*.

Sale of Citrus Grove Bearing Unmatured Fruit.—The recent Supreme Court decision in *Watson v. Commissioner*⁹⁴ sets to rest the controversy concerning the applicability of Section 117(j), to gain realized from sales, occurring before the 1951 amendments⁹⁵ to that section, of citrus groves at a time when an unharvested crop is still on the trees. In 1946, the Bureau had ruled⁹⁶ that the part of the gain realized in such a transaction properly allocable to the fruit should be treated as ordinary income. The Commissioner's position was that, irrespective of the nonseverance of the fruit from the trees, the sellers' ultimate purpose in raising the fruit was to sell the fruit to customers in the ordinary course of business and that any gain allocable to the fruit on the sale of a grove must be ordinary income. Taxpayers, however, attacked this ruling on the ground that they were not in the business of selling realty and groves to customers and that therefore Section 117(j) treatment should be accorded any gain realized on the sale of a grove. The Tax Court⁹⁷ and the ninth circuit⁹⁸ sustained the Commissioner, while the fifth⁹⁹ and tenth¹⁰⁰ circuits upheld the taxpayers.

The Revenue Act of 1951¹⁰¹ amended Section 117(j), non-retroactively, to provide that the gain from the sale of a grove of trees still bearing fruit should be accorded Section 117(j) treatment and in addition provided that any costs incurred in producing the fruit should not be deductible but should be capitalized as part of the basis of the grove of trees.

The Supreme Court in *Watson* now settles the problem as to the proper tax treatment of gain in the case of sales occurring prior to the effective date of the 1951 amendments. Holding that the 1951 amendments were not retroactive, the Court adopts the Commissioner's position that the fruit was held by the taxpayer primarily for sale to customers in the ordinary course of the taxpayer's trade or business. In the Court's view, there was nothing in the Code requiring

⁹⁴ 345 U.S. 544 (1953).

⁹⁵ Revenue Act of 1951, § 323, 65 Stat. 500 (1951).

⁹⁶ I.T. 3815, 1946-2 Cum. Bull. 30.

⁹⁷ Estate of Harry L. Miller, P-H 1951 TC Mem. Dec. ¶ 51,064 (1951); Louise Owen, P-H 1950 TC Mem. Dec. ¶ 50,300 (1950); Thomas J. McCoy, 15 T.C. 828 (1950); Ernest A. Watson, 15 T.C. 800 (1950).

⁹⁸ *Watson v. Commissioner*, 197 F.2d 56 (9th Cir. 1952).

⁹⁹ *Owen v. Commissioner*, 192 F.2d 1006 (5th Cir. 1951).

¹⁰⁰ *McCoy v. Commissioner*, 192 F.2d 486 (10th Cir. 1951).

¹⁰¹ Section 323, 65 Stat. 500 (1951).

property to be severed at the time of its sale in order for it to be characterized as inventory. The Court further pointed out that had the taxpayer been successful, he would have been able to deduct from ordinary income the entire cost of producing the crop while, at the same time, only one-half of the gain realized on the sale thereof would be included in income. In view of the provision in the 1951 amendment requiring the cost of production to be capitalized, Congress clearly indicated that the taxpayer, in cases arising prior to the 1951 Act, should not be allowed such a two-for-one advantage.

IV BASIS

Two changes respecting the basis of property were enacted by the Technical Changes Act in 1953.¹⁰² In the *Virginia Hotel*¹⁰³ case the Supreme Court held that the basis of property must be reduced by excessive depreciation even though the excessive depreciation did not result in a tax benefit. Congress, in 1952,¹⁰⁴ overturned the *Virginia Hotel* rule and provided that the basis should be decreased only to the extent that the excessive deduction resulted in tax reduction in the year when the deduction was taken, or for the amount of the allowable deduction whichever was greater. The relief provided by the 1952 Act was retroactive to prior years if an election was made not later than December 31, 1952. However, in view of the fact that the Treasury Regulations under the 1952 amendment were not promulgated until December 30, 1952, the Technical Changes Act extends the time for making the election to December 31, 1954, and allows any election made on or before December 31, 1952, to be revoked at any time before January 1, 1955.

The Technical Changes Act of 1953 includes another provision respecting basis. Prior to the 1953 Act, Section 113(a)(5) allowed trust property on the death of the grantor to receive a stepped-up basis when the trust was revocable and in addition the income from the trust was payable to the grantor or to his order. The new law extends this provision to cover trust property where the income is payable to the grantor or to his order and *where the grantor may alter, amend or terminate the trust*.¹⁰⁵

¹⁰² Pub. L. No. 287, 83d Cong., 1st Sess., § 102 (Aug. 15, 1953), 67 Stat. 615 (1953).

¹⁰³ *Virginia Hotel Corp. v. Helvering*, 319 U.S. 523 (1943).

¹⁰⁴ Pub. L. No. 539, 82d Cong., 2d Sess. (July 14, 1952), 66 Stat. 628 (1952).

¹⁰⁵ Pub. L. No. 287, 83d Cong., 1st Sess., § 203 (Aug. 15, 1953), 67 Stat. 616 (1953).

V

PARTNERSHIPS

Effect of Withdrawal of Partner on Partnership's Taxable Year.—

When a partnership's taxable year differs from that of a partner, the partner's withdrawal may result in the pyramiding of income if the partnership's taxable year, with respect to the decedent-partner, ends on the date of his death. Not only will his last return include his distributive share of the income earned by the partnership during the partnership's taxable year ending with the partner's taxable year,¹⁰⁶ but it will also include his distributive share of the income earned by the partnership from the date of the ending of the partnership's taxable year to the date of the decedent's death. Thus, if a partnership is on a fiscal year ending on June 30 and the decedent-partner is on a calendar year, and the decedent dies on December 31, 1952, his final return will include a distributive share of the partnership's income from July 1, 1951 to June 30, 1952, and in addition, his distributive share of the partnership's income earned from July 1, 1952 to December 31, 1952. Since the enactment of Section 126, it is no longer necessary to bunch all this income in the decedent's last return in order to prevent it from escaping taxation. The second circuit,¹⁰⁷ however, has held that the decedent's death closes the partnership's taxable year with respect to him. The third,¹⁰⁸ fifth¹⁰⁹ and eighth¹¹⁰ circuits, on the other hand, have held that it does not, if the partnership agreement provides that the partnership is to continue after the death of the partner. In *Estate of Joseph E. Tyree*¹¹¹ the Tax Court follows the position taken in these latter circuits. While a recent Revenue Ruling¹¹² holds that the death of a partner does not, in itself, effect the termination of the partnership for income tax purposes and that, therefore, the partnership's taxable year does not end with respect to the surviving partners, the Ruling is silent as to whether the partnership's taxable year closes with respect to the decedent. In view of the conflict between the circuits, this issue may be resolved before long by the Supreme Court.

¹⁰⁶ Int. Rev. Code § 188.

¹⁰⁷ *Commissioner v. Waldman*, 196 F.2d 83 (2d Cir. 1952). See also *Darcy v. Commissioner*, 66 F.2d 581 (2d Cir. 1933) (decided before enactment of Section 126).

¹⁰⁸ *Girard Trust Co. v. United States*, 182 F.2d 921 (3d Cir. 1950).

¹⁰⁹ *Hendersen's Estate v. Commissioner*, 155 F.2d 310 (5th Cir. 1946).

¹¹⁰ *Commissioner v. Mnookin's Estate*, 184 F.2d 89 (8th Cir. 1950).

¹¹¹ 20 T.C. No. 95 (1953).

¹¹² Rev. Rul. 144, 1953 Int. Rev. Bull. No. 16 at 29 (1953).

VI

DEDUCTIONS

Personal Expenses.—The controversial case of *George C. Couglin*¹¹³ has now been reversed by the second circuit.¹¹⁴ Expenses incurred by an attorney for tuition, travel, lodging and board incurred in attending the N.Y.U. Annual Institute on Federal Taxation are deductible from gross income under Section 22(a)(1)(A) as ordinary and necessary expenses incurred in the practice of the attorney's profession. In so holding, the second circuit distinguishes the case where education is acquired for its own sake as an addition to one's cultural background or "for possible use in some work which might be started in the future." The cost of obtaining information, on the other hand, which is needed for use in a lawyer's *established* practice is analogous to expenditures for dues to professional societies, subscriptions to professional journals and short-lived books which are deductible under the Regulations.¹¹⁵ This distinction between the cost of acquiring education for possible use in *future* practice and the cost of acquiring education necessary for *present* practice is further pointed up in the fourth circuit's decision in *Mays v. Bowers*,¹¹⁶ which holds that campaign expenses incurred prior to an election to a salaried office are not deductible business expenses.

Under the rationale of the second circuit's opinion, the cost of postgraduate courses taken by practicing professionals should be deductible as an ordinary and necessary business expense. It remains to be seen whether the Treasury and the Tax Court will be more liberal in their attitude toward the deductibility of the cost of the continuing process of professional education.

The justifiable liberality of the decision in the *Couglin* case is balanced by the justifiably strict rule (as to most of the items involved) promulgated in the recent Tax Court case of *Richard A. Sutter*¹¹⁷ respecting the deductibility, as a business expense, of the cost of meals, entertainment, Christmas gifts, etc. The Tax Court in this case lays down the rule that to the extent that these expenditures are a substitute for personal expenses that would normally be incurred by the taxpayer or his family while the taxpayer is not away from home, they are not deductible as business expenses under Section 23(a)(1)(A). The propriety of this holding in tightening up wide-

¹¹³ 18 T.C. 528 (1952).

¹¹⁴ 203 F.2d 307 (2d Cir. 1953).

¹¹⁵ U.S. Treas. Reg. 118, § 39.23(a)-5 (1953).

¹¹⁶ 201 F.2d 401 (4th Cir. 1953).

¹¹⁷ 21 T.C. No. 20 (1953).

spread abuses in the taking of deductions for entertainment expenses cannot be questioned.

Embezzlement Losses.—Treasury policy with respect to embezzlement losses has been to allow a deduction for the loss in the year the embezzlement occurred and not in the year the loss was discovered.¹¹⁸ This rule, of course, creates hardship whenever the embezzlement is discovered after the statute of limitations has run on the year of loss. The Supreme Court, however, allowed the loss to be deducted in the year of the discovery in one case where diligent investigation failed to reveal when the funds were taken,¹¹⁹ and in another case where the embezzlement was not discovered until ten years after the theft.¹²⁰ Revenue Ruling 183¹²¹ now follows suit, holding that embezzlement losses can be deducted in the year of discovery (1) where it is impossible to identify the years and the amount of the embezzlement or (2) where the embezzlement is not discovered for many years due to the secret maneuvers of the embezzler and hardship would result if deduction in the year of discovery were not allowed. This is a welcome relaxation of the rule requiring deduction only in the year of the embezzlement, since the necessary hardship should be found whenever the statute of limitations precludes the opening of the year when the embezzlement occurred.

Loss on Sale of Bonds Required as Security.—The cases of *Western Wine and Liquor Co.*¹²² and *Charles A. Clark*¹²³ are followed by the Tax Court in *The Bagley and Sewall Co.*¹²⁴ In the former cases, the Tax Court allowed taxpayer-liquor dealers to deduct from income, as a part of the cost of goods sold, a loss on corporate stock which had been acquired solely to obtain liquor which the corporation was distributing to its shareholders, and which had been sold immediately after receipt of the liquor. Relying on these cases, the Tax Court, in *Bagley*, allows the taxpayer to deduct a loss on the sale of Government securities as an ordinary and necessary business expense. In order to obtain a contract to supply Finland with paper-mill machinery, the taxpayer had been required to deposit these bonds as security for the performance of the contract and had acquired them by borrowing money at a higher rate of interest than the 2 1/2 per cent return on the Government bonds.

¹¹⁸ U.S. Treas. Reg. 118, § 39.43-2 (1953). The basis for this ruling is found in Int. Rev. Code § 23(e) and (f) which authorizes deductions for "losses sustained during the taxable year." (Emphasis supplied.)

¹¹⁹ *United States v. Stevenson-Chislett, Inc.*, 344 U.S. 167 (1952).

¹²⁰ *Alison v. United States*, 344 U.S. 167 (1952).

¹²¹ 1953 Int. Rev. Bull. No. 19 at 5 (1953).

¹²² 18 T.C. 1090 (1952).

¹²³ 19 T.C. 48 (1952).

¹²⁴ 20 T.C. No. 138 (1953).

In all three of these cases the basis for decision was the court's finding that the securities in question were purchased as an incident to the regular business of the taxpayer and were not acquired for investment purposes. Thus, the Tax Court in all three cases distinguished the earlier case of *Exposition Souvenir Corporation v. Commissioner*.¹²⁵ This case had held that a taxpayer who had been required to purchase World's Fair debentures in order to obtain a concession at the Fair, incurred a capital loss upon the sale of the debentures at the closing of the World's Fair, because the debentures had been acquired for investment. An investment purpose was found in view of the facts that (1) the contract with the Fair corporation characterized the acquisition as an investment and that (2) the requirement of purchase was motivated by a desire to interest the concessionaires in the successful operation of the Fair. Although the securities in *Bagley* were not sold for several years, until after the completion of the contract, whereas in the liquor cases they had been sold almost immediately after acquisition, the court held that it would be patently ridiculous to treat the acquisition of Government securities as an investment when the return on those securities was less than the cost of borrowing funds in order to purchase them.

The ramifications of the decisions in these three cases are interesting and many. In the first place, as was pointed out by the dissenting opinion in the *Western Wine* case, the theory underlying the decisions might well require a gain on the subsequent sale of these securities to be treated as an ordinary gain. Furthermore, the rationale introduces difficult accounting problems. If in the liquor cases the stock had been sold in a year other than the year of disposition of the whiskey, would it have been proper to treat the loss as part of the cost of goods sold during the year of disposition of the stock? Or if less than the period of limitation had elapsed from the time of the disposition of the initial inventory, would it have been proper to open up the prior year? Of course, if the period of limitation has elapsed, the problem would probably not arise since the length of time the stock was held would probably justify characterizing the securities as a capital asset held for investment. In the *Bagley* case, since payments under the contract were to be made as the work progressed and the bonds were sold after the completion of the contract, there could have been a problem as to the proper allocation of the deduction item. The point, however, was not raised and apparently the entire loss was deductible as an ordinary business expense in the year in which the securities were sold.

Payments for OPA Violations.—While the Commissioner's with-

¹²⁵ 163 F.2d 283 (2d Cir. 1947).

drawal of his original nonacquiescence¹²⁶ in the case of *Lela Sullenger*¹²⁷ has put to rest the question as to whether payments in excess of World War II price ceilings are properly included in the cost of all goods sold,¹²⁸ taxpayers and the courts are still being plagued with the question as to whether payments for OPA violations are deductible business expenses. The test of deductibility as laid out in *National Brass Works, Inc. v. Commissioner*¹²⁹ is whether the overcharges were, on the one hand, made wilfully or as the result of failure to take reasonable precautions, or on the other hand, were made innocently and unintentionally and without an unreasonable lack of care. If the former is true, then the payments are not deductible under the public policy rule; if the latter, then the deductions are allowable. Once again, tax liability depends upon an undeterminable standard. In the *National Brass Works* case an intentional violation was found where the taxpayer ignored an OPA directive to reduce prices on the ground that it believed the reduction should be offset by a simultaneous increase in freight rates, despite counsel's advice that OPA consent should first be sought. And in *George Schaefer & Sons, Inc.*¹³⁰ the deduction was disallowed where the taxpayer only made inquiry of other firms as to whether a rumored amendment to the OPA regulations governing poultry prices had gone into effect. On the other hand, in *Commissioner v. Pacific Mills*,¹³¹ a payment in settlement of an alleged violation of price control regulations which was made under protest because continuation of a controversy with the OPA over the interpretation of the regulations would have a retarding and adverse affect on the taxpayer's business was deductible. The uncertainty engendered by these cases once again points to the desirability of a definitive legislative standard with respect to the disallowance of deduction on the grounds of public policy.

VII

EXCLUSIONS FROM GROSS INCOME

Income Earned Abroad by Nonresident Citizens.—Section 116(a)(2) had excluded from gross income, income earned abroad by a nonresident citizen who during a period of eighteen consecutive months was present in a foreign country for at least 510 days. The

¹²⁶ 1952-2 Cum. Bull. 3.

¹²⁷ 11 T.C. 1076 (1948); appeal dismissed without opinion, 4 P-H 1950 Fed. Tax Serv. ¶ 71,055 (5th Cir. 1950).

¹²⁸ Under the Sullenger case, these payments are includible in the cost of goods sold.

¹²⁹ 205 F.2d 104 (9th Cir.), 4 P-H 1953 Fed. Tax Serv. ¶ 72,582 (1953).

¹³⁰ P-H 1953 T.C. Mem. Dec. ¶ 53,112 (1953).

¹³¹ 207 F.2d 177 (1st Cir.), 4 P-H 1953 Fed. Tax Serv. ¶ 72,707 (1953).

Technical Changes Act of 1953¹⁸² now limits to \$20,000 the amounts excludable for any taxable year included within the eighteen-month period.

VIII

TRANSACTIONAL ADJUSTMENTS AND ACCOUNTING

Section 107 Averaging.—Two interesting cases concerning the application of Section 107 were decided this year. Section 107 provides that where 80 per cent of the total compensation for personal services over a three-year period is received in one taxable year, the tax on such compensation shall not be greater than the taxes that would have resulted had the income been included ratably in the gross income of each of the prior years. Whether this section allows a reallocation of gross income for each of these prior years or merely determines the tax rate to be imposed in the year of receipt has been a question of lively controversy. The Commissioner has asserted that the sole purpose of the section is to alleviate the swelling of surtax rates resulting from the bunching of income. Thus in *Frederico Stallforth*¹⁸³ he did not allow a taxpayer to treat as tax free the income attributable to periods when he was abroad and not subject to taxation by virtue of Section 116. This position was sustained by the court. But in *Edward C. Thayer*¹⁸⁴ the taxpayer successfully contended that his medical deduction for the year of receipt should be his medical expenses in excess of five per centum of the gross income attributable to that year under Section 107.

The recent Tax Court case of *Albert G. Redpath*¹⁸⁵ raises a slightly different though related question. There the taxpayer suffered a net loss during the year the bunched income was received. If he were able to treat part of the bunched income as part of gross income for the preceding years, he would have a larger net operating loss which could be carried back. But if the entire amount was included in the year of receipt his net operating loss carryback would be much less. In deciding this question, however, the court did not have to deal with the basic question discussed above. Since Section 107 merely *limits* the amount of tax imposed in the year of receipt, and since, because of the loss, there was no tax liability in the year of receipt to be limited, Section 107 was inapplicable.

An even more interesting fact situation was presented by *Hofferbert v. Marshall*,¹⁸⁶ where the taxpayer in 1948, after the enactment of

¹⁸² Pub. L. No. 287, 83d Cong., 1st Sess., § 204 (Aug. 15, 1953); 67 Stat. 618 (1953).

¹⁸³ 6 T.C. 140 (1946).

¹⁸⁴ 12 T.C. 795 (1949).

¹⁸⁵ 19 T.C. 470 (1952).

¹⁸⁶ 200 F.2d 648 (4th Cir. 1952).

the split income provisions, received compensation allocable to the years 1938 through 1945, when the Code did not provide for income splitting by spouses. The fourth circuit allowed the taxpayer to compute his tax for the earlier years by applying the split income provisions. This decision seems inconsistent with both the throwback and the rate theory.¹³⁷

Involuntary Change of Accounting Methods.—Where the Commissioner has required a cash-basis taxpayer to change to the accrual method—on the ground that the former basis does not correctly reflect income—he has sought to pyramid income by adding opening inventories and receivables to the income of the year when the change takes place. Opening inventories are sought to be added in order to prevent the taxpayer from taking a double deduction for the cost of goods sold; opening receivables are added because otherwise the amounts accrued in past years would never be reported in income. These adjustments have been criticized on the ground that they violate the concept of an annual accounting period.¹³⁸ Where the taxpayer voluntarily makes or seeks the change in accounting method, the pyramiding adjustments are justifiable on the ground that the Commissioner could not have asserted a deficiency for items wrongfully included or deducted in the years when the cash method was used because presumably the use of the cash method in those years was not incorrect. On the other hand, where the Commissioner requires the change because the taxpayer was erroneously using a cash method, the Commissioner could have avoided the distortion of income by asserting deficiencies for the prior years, at least those not outlawed.

The rule allowing the Commissioner to make the pyramiding adjustments reached its fullest strength in the case of *Hardy v. Commissioner*.¹³⁹ In subsequent cases, the attempt to restore the principle of the annual accounting period by distinguishing the *Hardy* case resulted in the emergence of a rule that the pyramiding adjustment could be made if the taxpayer, who is forced to change his accounting method, has used an erroneous method in both reporting his income and keeping his books, but could not if his bookkeeping was correct and just his reporting was wrong.¹⁴⁰

This distinction, having no foundation in logic whatsoever, has finally been eliminated and the *Hardy* case overruled, in a series of

¹³⁷ See *Robertson v. United States*, 343 U.S. 711 (1952).

¹³⁸ See *Dixon*, *Pyramiding Income in Changing from a Cash to an Accrual Method of Accounting*, 8 Tax L. Rev. 355 (1953).

¹³⁹ 82 F.2d 249 (2d Cir. 1936).

¹⁴⁰ See *Robert G. Frame*, 16 T.C. 600 (1951), aff'd, 195 F.2d 166 (3d Cir. 1952); *Marion R. Schuyler*, 10 CCH T.C. Mem. 439 (1951), aff'd, 196 F.2d 85 (2d Cir. 1952); *Commissioner v. Mnookin's Estate*, 184 F.2d 89 (8th Cir. 1950).

cases decided this year. In *Welp v. United States*¹⁴¹ the taxpayer kept both his books and his income tax returns on the cash basis. When the Commissioner required him to change to the accrual method of accounting, he did not allow the taxpayer to use an opening inventory for the year of change. Absent fraud, the eighth circuit refused to follow the distinction carved out in the *Frame*¹⁴² line of cases and held that the pyramiding of adjustments was not proper. Even though no tax was paid on the opening inventory because costs were deducted on prior years' returns, the objective of the Code to ascertain and report true income should not be subordinated to the extent that income accruing in one year be treated as income accruing in another by reason of the application of an accounting method.

In *Caldwell v. Commissioner*¹⁴³ the taxpayer used inventories but reported on a straight cash receipts method. When the taxpayer was required to change to a straight accrual method the Commissioner sought to add accounts receivable accrued in prior years to the current year's income. While decision could have been based on the distinction carved out in the *Frame*, *Schuyler* and *Mnookin* cases,¹⁴⁴ the second circuit, in rejecting the Commissioner's inclusion of the amounts included in prior years, repudiated in no uncertain terms the decision in the *Hardy* case. The retreat from the *Hardy* case is completed by the second circuit in *Commissioner v. Dwyer*.¹⁴⁵ There the taxpayer kept his books and reported income on a cash basis. When the Commissioner switched the taxpayer to an accrual basis, he disallowed a deduction for any opening inventory. The second circuit squarely overrules the *Hardy* decision and holds that even where both books and tax returns are kept erroneously, the Treasury may not assess a tax for a later year to make up for a credit erroneously allowed in an earlier year.¹⁴⁶

IX

STATUTE OF LIMITATIONS

Application of Five-Year Period of Limitation.—Two cases decided by the Tax Court this year show the difficulty of avoiding

¹⁴¹ 201 F.2d 128 (8th Cir. 1953).

¹⁴² 16 T.C. 600 (1951), aff'd, 195 F.2d 166 (3d Cir. 1952). See cases cited in note 140 supra.

¹⁴³ 202 F.2d 112 (2d Cir. 1953).

¹⁴⁴ See note 140 supra.

¹⁴⁵ 203 F.2d 522 (2d Cir. 1953).

¹⁴⁶ In the case of David W. Hughes, P-H 1953 TC Mem. Dec. ¶ 53,285 (1953), decided between the decisions in *Caldwell* and *Dwyer*, the Tax Court adheres to the old distinction and holds that where the books and the returns are both kept on the cash basis the Commissioner may properly include in current income amounts accrued in prior years when a change is required. This decision has now been set aside and vacated and is being reconsidered. P-H 1953 TC Mem. Dec. ¶ 53,371 (1953).

the application of the five-year statute of limitations unless income is actually reported in gross income before the due date of the tax return for that year. Under Section 275(c), the ordinary three-year statute of limitations becomes five years from the date the return is filed "if the taxpayer omits from gross income an amount properly includible therein which is in excess of twenty-five per centum of the amount of gross income stated in the return. . . ."

In *Peyton G. Nevitt*¹⁴⁷ the taxpayer did not include in his gross income a preferred stock dividend, but attached to the return a notice indicating the receipt of the stock dividend. He contended that because he had noted the receipt of this stock his omission from gross income was less than 25 per cent and that the five-year statute of limitations did not apply. The Tax Court, however, construes the section strictly, and holds that the attaching of a schedule to the taxpayer's return stating that the taxpayer received an amount but that this amount was not taxable, does not relieve the taxpayer from the effect of having omitted the amount from his gross income.

In *Ira Goldring*¹⁴⁸ the Tax Court had occasion to discuss the effect on Section 275(c) of an amended return filed after the due date for the original return. While the original return filed omitted more than 25 per cent of gross income, the taxpayers filed an amended return which omitted less than the requisite 25 per cent. The court held that nevertheless the five-year statute of limitations applied, pointing out that the filing of an amended return was a matter of administrative grace and not a statutory right. If taxpayers were permitted to file amended returns out of time and relate them back to the original returns so as to correct partially the omission therein, the effect would be to nullify Section 275(c) and to extend the time of filing beyond the time prescribed in the Code.

These two cases should be compared with the Tax Court decision in *Maurice H. Van Bergh*.¹⁴⁹ There, the taxpayer, under Section 107, computed his tax for the taxable year by allocating a part of the income received during that year for personal services to prior years. Since the amounts allocated to the prior years exceeded 25 per cent of the gross income for the taxable year, the Commissioner contended that the five-year statute of limitations applied. The court, however, held that the three-year statute was applicable, pointing out that Section 107 provides that "the tax attributable to [the total compensation received] which is included in the gross income of any individual shall not be greater than the aggregate of the taxes attributable [to

¹⁴⁷ 20 T.C. No. 40 (1953).

¹⁴⁸ 20 T.C. 79 (1953).

¹⁴⁹ 18 T.C. 518 (1952).

the compensation had the compensation been ratably included in the gross income of the years when earned].” Therefore, the taxpayer could not claim the benefits of the tax computation of Section 107 and at the same time omit from gross income the very amounts upon which the statute operates only if included in gross income.

Form 990 Not a Return for Purpose of Statute of Limitations.—Under Section 276(a), tax may be assessed at any time where no return has been filed. In the recent case of *Automobile Club of Michigan*¹⁵⁰ the Tax Court held that the filing of a Form 990 by an organization is not a return which starts the running of the statute of limitations. This case, if upheld, now makes it possible for the Commissioner to assert deficiencies for many prior years even though he had previously ruled that the organization was exempt. In the *Michigan* case an automobile club had received a ruling in 1934 that it was exempt from tax. Relying on the ruling and the Regulations¹⁵¹ which provided that it need not file income tax returns unless it changed its organization, operations or purposes, it did not file any tax returns until 1945 when the Commissioner revoked its prior ruling and held that the club was taxable under the Code. The Commissioner, however, asserted deficiencies not from the year 1934, but only from the years beginning with 1943. The taxpayer contended that the filing of Form 990 was a return for the purpose of starting the running of the statute of limitations but the court held otherwise. This case may very well present a trap for charitable organizations. Under it, in order for them to be protected for years when they have good reasons to believe that they are exempt, they must file returns like any other corporation. Moreover, as the *Nevitt* case indicates, in order for the organization to protect itself fully, it would not only have to file the return but it would have to report its income, and perhaps even be required to pay tax thereon and thereafter sue for a refund.

It is questionable whether this decision will be upheld. In *Germantown Trust Co. v. Commissioner*¹⁵² the Supreme Court held that the filing of a fiduciary return by a trust which was later determined to be taxable as a corporation was sufficient to start the running of the statute of limitations even though a corporate income tax return had not been filed. In so holding, the Supreme Court pointed out that the fiduciary return contained all the data from which a tax could be computed and assessed although it did not purport to state any amount due as tax. Although the Tax Court stated that the

¹⁵⁰ 20 T.C. 145 (1953).

¹⁵¹ U.S. Treas. Reg. 103, § 19.101-1 (1953).

¹⁵² 309 U.S. 304 (1940).

return filed on Form 990 by the Automobile Club of Michigan did not contain sufficient data from which its income and excess profits tax liability could be computed, the information required by Form 990 today, such as the supplying of a balance sheet and statement of income and disbursements, does seem sufficient for this purpose.

Mitigation of the Effect of the Statute of Limitations.—Under the former provisions of Section 3801, prior years, after the running of the statute of limitations, may be opened up by both the Commissioner and the taxpayer if an inconsistent position with respect to the deductibility or includibility of an item has been maintained. For example, if the Commissioner had in a prior year held that an item was includible in gross income and six years later he asserts that the same item should be properly includible in the later year, the prior year may be opened up to eliminate the inclusion of the item at that time. Section 3801 is now amended by the Technical Changes Act of 1953¹⁸⁸ to broaden its application to situations where a deduction claimed in a later year should have been allowable in an earlier year or when an inclusion claimed in a later year should have been excluded in an earlier year. Thus the statute no longer restricts itself to circumstances where an inconsistent position has been maintained.

X

CONCLUSION

Apart from the developments in the stock dividend and reorganization areas, 1953 was a year of few far-reaching judicial and legislative changes. Fiscal policy problems involving the conflict between a balanced budget and lower taxes, rather than technical revision, were the main 1953 headline makers. However, a good part of the year was spent by the Treasury, the Staff of the Joint Committee on the Administration of the Internal Revenue Laws, and the House Ways and Means Committee on extensive study preparatory to major tax legislation to be enacted in 1954. The Revenue Act of 1954 therefore is likely to be the most comprehensive and important tax statute since 1942. A thorough revision and overhauling of the "hodge podge" of income tax laws is promised. Doubtless there will be improvements, whether of substance or of language; but revenue requirements on the one hand, and political expediency on the other will preclude—except perhaps to a token degree—the correction of certain major inequities, *e.g.*, double taxation of corporate income, lack of pension contribution deductions for the self-employed, and special legislation favoring certain taxpayers to a more than justifiable degree.

¹⁸⁸ Pub. L. No. 287, 83d Cong., 1st Sess. § 211(b) (Aug. 15, 1953), 67 Stat. 625 (1953).

FEDERAL ESTATE AND GIFT TAXATION

JOSEPH TRACHTMAN

THE YEAR 1953 was not one of the exciting years in this field. There were no startling legislative, judicial or administrative developments. The Technical Changes Act of 1953¹ eliminated some inequities; the Supreme Court's efforts were limited to one short opinion² and a one-line per curiam decision;³ and while there was the usual output of lower court decisions, few were noteworthy and none of widespread interest. Proposed regulations relating to the Powers of Appointment Act of 1951⁴ (which did not say very much) were published,⁵ but they have not yet come into force.

I

THE ESTATE TAX: GROSS ESTATE

Interest of the Decedent.—The courts seem to have felt that Section 811(a) includes only interests which are actually owned by the decedent and have not been inclined to find among such interests things that amounted to less than absolute beneficial ownership.⁶

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¹ Pub. L. No. 287, 83d Cong., 1st Sess. (Aug. 15, 1953), 67 Stat. 615 (1953).

² *Lober v. United States*, 74 Sup. Ct. 98 (1953). Justices Douglas and Jackson dissented.

³ By an equally divided court the seventh circuit's decision in *Harrison v. Bohnen* was affirmed. 345 U.S. 946 (1953). See 1951 Annual Surv. Am. L. 221 for a discussion of the lower court's decision in this combined life insurance-annuity contract case. This oblique touch by the Supreme Court raises some questions which would be more interesting if this kind of transaction enjoyed the popularity that it had when there was a \$40,000 exemption for life insurance. Does the per curiam action by eight justices constitute stare decisis? Will the Treasury proceed on the basis that it has favorable decisions in three of the four circuits where the question has been raised—or will it abide by the per curiam decision?

⁴ 65 Stat. 91 (1951), 26 U.S.C. §§ 811(f), 1000(c) (Supp. 1952).

⁵ 18 Fed. Reg. 4599 (1953).

⁶ In *Hanner v. Glenn*, 111 F. Supp. 52 (W.D. Ky. 1953) the decedent's employer created a trust fund out of which benefits were payable to certain employees, including the decedent. Contributions were made only by the employer. The benefits were payable upon decedent's attaining the age of sixty-one, or upon his leaving the company's employ, whichever occurred first; but if the decedent died prior to the occurrence of either event his rights to the benefits were to cease and they were to be paid as decedent might appoint by will to his wife and descendants. The decedent appointed to his wife and the Commissioner sought to include the payments to her in the gross estate under several sections, including 811(a). The executor met the argument as to each section, including 811(a). The court did not specifically consider the applicability of Section 811(a), but in deciding that the decedent had not made a transfer under 811(c) or (d) the court

Recently the Tax Court looked at what occurred after death to test whether or not there was ownership at the moment of death.⁷ Under a bonus plan established by the decedent's employer, awards were payable to the decedent in equal annual installments. At the decedent's death several installments were unpaid. It was contended that because the decedent had not received these amounts he did not own them at his death—and especially because the awards could be forfeited, at the employer's option, if the employee resigned or was dismissed. The court declared that the forfeiture provision was a condition subsequent, and since neither contingency had occurred at the date of death, the decedent had a vested property interest in the unpaid installments which was includible in his gross estate under Section 811(a).

Transfers in Contemplation of Death.—By the Revenue Act of 1950 transfers made more than three years before death cannot be attacked as having been made in contemplation of death—if death occurs after September 23, 1950.⁸ But courts are still dealing with estates of decedents who died before that date; and even as to the estates of persons who died thereafter there is a rebuttable presumption that transfers made within three years of death were made in contemplation of death.⁹ Thus the groping search for what was in the mind of a dead man has not yet been completely eliminated.

In *Campbell's Estate v. Kavanaugh*¹⁰ the Treasury was sure that it had nailed down the deceased's dominant motive in making the transfers. Twelve years before he died, the decedent gave shares of stock in a close corporation to members of his family. On his gift tax return for 1935, in answering the question as to what was his "motive" for the gifts, he wrote: "to avoid future inheritance taxes." It is interesting to guess what prompted such bold declaration—anger at the tax collector—or a naïve blurting of the truth? Anyway, the district court refused to let the professed statement control, pointing out that at the time of the gifts the decedent was in good health, that he had made many other gifts, that he wanted his son to have a share in the business and that not until another eight years passed did he make his will. The court concluded that the gifts were "the unintended target of a public accountant's enthusiasm with misapprehension of the law,"¹¹ and ruled for the executor.

ruled that he lacked an interest in the fund—his interest was contingent on events that had not occurred.

⁷ Estate of Albert B. King, 20 T.C. No. 131 (1953). Cf. Estate of Albert L. Salt, 17 T.C. 92 (1951).

⁸ Int. Rev. Code § 811(1).

⁹ Ibid.

¹⁰ 114 F. Supp. 780 (E.D. Mich. 1953).

¹¹ Id. at 783.

The Treasury Department also lost in a third circuit case in which the decedent, over a period of years, made gifts to his son of stock in family corporations.¹² The Tax Court had ruled that the transfers were made in contemplation of death because the son was the decedent's sole legatee, and therefore the gifts paralleled the plan of his will and had been made to carry out a testamentary scheme.¹³ But the third circuit reversed, citing as a compelling lifetime motive the decedent's desire promptly to reward the son's business acumen and the decedent's good health during the period of the gifts.

Transfers with Retained Right of Possession or Enjoyment.—

The arrangements that obviously fall within Section 811(c)(1)(B) are those in which the decedent retained a life estate. But the section is not limited to the obvious—the regulations say that trust income is deemed to have been retained by the decedent if it is to be applied toward the discharge of a legal obligation of the decedent, or otherwise for his pecuniary benefit.¹⁴ Suppose the decedent established an inter vivos trust for the benefit of his wife, and provided that she should receive a stated sum out of income and principal, every month, which was to provide in full for her bills and expenses and her care, maintenance and support; and if she failed to use income for her obligations or her support the trustee (upon notice from the settlor) should discontinue payments to the wife and apply the income for those purposes directly.¹⁵ When confronted with that state of facts in 1940 the eighth circuit concluded that the decedent had retained the right to the trust income for life, and that the remainders were therefore includible in his gross estate. The court reasoned that the decedent was legally obligated to support his wife and that by directing that trust income be used to discharge this obligation, he was, in effect, receiving the income himself and turning it over to her.¹⁶

The second circuit recently extended this line of thought.¹⁷ The decedent created two inter vivos trusts, the income of which was payable in monthly installments for the beneficiaries' "support and maintenance." The decedent's wife was entitled to 40 per cent of

¹² *Belyea v. Commissioner*, 206 F.2d 262 (3d Cir. 1953). The Treasury was also the loser in *Estate of Frank W. Thacher*, 20 T.C. No. 64 (1953), and *Estate of Louis Richards*, 20 T.C. No. 128 (1953), where the presence of large insurance policies on the settlors' lives in trusts created by them were held to be outweighed by factors connected with life.

¹³ *Estate of Truman S. Belyea*, P-H 1952 TC Mem. Dec. ¶ 52,337 (1953).

¹⁴ U.S. Treas. Regs. 105, § 81.18 (1942).

¹⁵ These facts appear in *Estate of Paul F. Donnelly*, 38 B.T.A. 1234 (1938).

¹⁶ *Helvering v. Mercantile-Commerce Bank & Trust Co.*, 111 F.2d 224 (8th Cir. 1940), reversing 38 B.T.A. 1234 (1938). *Certiorari* was denied, 310 U.S. 654 (1940).

¹⁷ *Commissioner v. Dwight's Estate*, 205 F.2d 298 (2d Cir.), cert. denied, 22 U.S.L. Week 3124 (U.S. Nov. 10, 1953).

the income of the first trust and all of the income of the second. The Commissioner, pointing to the eighth circuit decision, contended that the decedent had retained the right to have the income applied to satisfy his obligation to support his wife. The Tax Court refused to include the corpus of the trusts in the gross estate on the theory that the phrase "support and maintenance" at most showed the motive for establishing the trusts, and that nothing in the trust instruments showed that the settlor intended to have any enforceable means of restricting his wife's use of income to the payment of her expenses for her support and maintenance.¹⁸ But the second circuit found the 1940 decision to be indistinguishable. The court observed that the trust was, at least, a partial discharge of the decedent's duty to support his wife, and its existence would have been a pro tanto defense to any suit by the wife for support. The court declared that the lack of a provision for rigid supervision of the wife's use of income did not weaken these views.¹⁹ It was suggested that had the executors sustained the burden of proof on the issue, the transfers would not have been taxable to the extent that the income exceeded what the law would have required the decedent to pay his wife had he been guilty of nonsupport. The second circuit's view that the words "for support and maintenance" carry a vital connotation should shock practitioners who use the phrase not for the purpose of placing restrictions on the beneficiaries' use of trust income but merely because it is part of their boiler-plate.

Transfers Intended to Take Effect at Death.—In the hope of quieting the tempest which its predecessors had provoked, the present expanded form of Section 811(c) was enacted in 1949, and provided different rules for determining includibility depending upon whether the transfers were made before or after October 8, 1949.

The Technical Changes Act of 1949²⁰ abrogated the *Church* rule²¹ if the transfer was made before March 4, 1931 (or in certain cases, June 7, 1932), and if the transferor died after February 10, 1939, and before June 1, 1951.

The Technical Changes Act of 1953²² abrogates the *Church* rule as to such transfers no matter when the decedent died, and also provides for refunds in respect of the estates of certain decedents

¹⁸ Estate of Arthur S. Dwight, 17 T.C. 1317 (1952).

¹⁹ But see Commissioner v. Douglass' Estate, 143 F.2d 961 (3d Cir. 1944). The court declined to include in the decedent's gross estate a transfer in trust for the maintenance, education and support of his minor child.

²⁰ 63 Stat. 894 (1949).

²¹ Commissioner v. Estate of Church, 335 U.S. 632 (1949) (a 1924 transfer, with income reserved by the settlor for his life, held includible in the settlor's gross estate).

²² See note 1 supra.

who died before February 11, 1939, and whose estates were taxed by reason of transfers made before March 4, 1931.

Taxability as to post-1949 transfers under Section 811(c) turns on whether the beneficiaries can have possession or enjoyment of the property only by surviving the transferor.²³ This factor is also a requirement for taxability of pre-1949 transfers but as to such transfers an additional factor must be present: the decedent must have retained, by express terms, a reversionary interest whose value exceeds 5 per cent of the value of the transferred property.²⁴

A pre-1949 transfer was involved in *Commissioner v. Marshall's Estate*.²⁵ In 1931 the decedent established two trusts and his wife was granted part of the income from both for her life. Upon her death the trusts were to terminate and the corpus was to be distributed to her appointees by her will—in default of appointment the distribution was to be among those who would take under the laws of Pennsylvania if she had died intestate owning the trust property. Under such law a surviving spouse is entitled to one-third of the estate. The Commissioner argued that one-third of the corpus of the trust was includible in the decedent's gross estate on the ground that he had expressly retained a reversionary interest, and that the beneficiaries could have possession or enjoyment of such one-third only by surviving him. The third circuit, affirming the Tax Court,²⁶ ruled against the Treasury Department on both counts. The opinion emphasized that when the statute says "express terms" it means a direct and distinct reservation, which is a good deal more than an implication. On the issue of survivorship the court reminded the Commissioner that the intestate law of Pennsylvania could have been changed to eliminate the surviving spouse's one-third share and that the existing Pennsylvania law contains the common proviso that the surviving spouse loses his intestate share upon divorce, or upon failure to support the deceased spouse. Thus, it was possible for beneficiaries to have possession or enjoyment of the one-third without surviving the decedent.

A rather subtle point was presented in *Estate of Thacher*. The wife was the life beneficiary of a trust created by her husband in 1922, and he expressly retained a reversionary interest by providing that upon divorce or legal separation, or if she predeceased him, the corpus was to revert to him. The executors conceded that the remainder interests which were limited after the wife's life estate were

²³ Int. Rev. Code § 811(c)(3).

²⁴ Int. Rev. Code § 811(c)(2).

²⁵ 203 F.2d 534 (3d Cir. 1953).

²⁶ *Estate of Charles D. Marshall*, 16 T.C. 918 (1951).

includible under Section 811(c) but they balked when the Commissioner claimed that the wife's life estate was also includible under that section. The Tax Court said that although the wife became entitled to *income* immediately upon the creation of the trust, her right to a *life estate* could be cut off by a divorce or separation, and only the death of her husband removed this disrupting possibility. Therefore, her right to income did not ripen into a life estate until her husband's death, and the value of the life estate was not to be excluded from his gross estate.²⁷ It is submitted that the statute speaks only of transfers *intended to take effect* at the decedent's death; and that the wife had but one interest—a life estate, and though subject to termination it took effect upon creation of the trust. There seems to be nothing in the statute which permits slicing such an interest into a present life estate which is not includible in the gross estate and a future life estate which is includible.

Retained Powers.—The Tax Court's splitting of life interests was disapproved in the *Shiland* case²⁸ where the settlor created a ten-year trust for the benefit of his nephews, and named them as trustees. If the nephews were alive at the end of the ten-year period, the corpus was to be paid over to them; if they were then dead, the corpus was to be paid over to such persons as the nephews might appoint. The trust could be terminated in favor of the nephews prior to the expiration of the trust term by the joint action of the nephews, but if the settlor were alive his consent was required to make the termination effective. At the settlor's death the power to terminate was unexercised and the trust term had four years to run. The Tax Court ruled that the corpus of the trust was includible in the decedent's gross estate under Section 811(d) because he had retained a power to terminate in conjunction with others.²⁹ The Tax Court further held that the amount includible was the value of the corpus minus the value of the remaining years during which the nephews were entitled to income. The second circuit stated that the decedent's power to terminate only affected the remainders, for under no contingency could the nephews receive less than life estates. Therefore, the amount includible was the value of the corpus less the value of the nephews' life estates.

In the *Lehman* case, decided in 1940, the second circuit laid down the reciprocal trust doctrine.³⁰ In that case it was found that two brothers each made transfers in trust, each in consideration of an

²⁷ Estate of Frank W. Thacher, 20 T.C. No. 64 (1953).

²⁸ *Shiland v. Commissioner*, 203 F.2d 679 (2d Cir. 1953).

²⁹ Estate of Charles S. Inman, 18 T.C. 522 (1952).

³⁰ *Lehman v. Commissioner*, 109 F.2d 99 (2d Cir.), cert. denied, 310 U.S. 637 (1940).

identical transfer by the other. Each settlor made his brother a life beneficiary of income, gave the brother power to invade corpus, and directed that the remainder be paid over to the brother's issue. Although the statute spoke only of a decedent who made a transfer with enjoyment of the property subject to his power to alter, amend or revoke, the court held that within such words was the case of a decedent who, by giving a quid pro quo, induced another to make a transfer with enjoyment of the property subject to such power in the decedent. The doctrine, while well recognized today, has not gone unscathed. The courts give it effect only when it is shown that each trust was created in consideration of the other.⁸¹ The third circuit recently found such consideration to be lacking in *Newberry's Estate*.⁸² Mr. Newberry created irrevocable trusts for the benefit of his children, named his wife and himself trustees, and gave his wife power to alter, amend or terminate the trust created by him but provided that she could not vest any portion of principal or income of that trust in him. Mrs. Newberry, the decedent, created identical trusts, and she did so at the same time her husband established his trusts. Under her trusts the power to alter, amend or terminate was given her husband, and he could not vest any principal or income of her trusts in her.

Reversing the Tax Court,⁸³ the third circuit construed the reciprocal trust doctrine strictly, and refused to regard the decedent as the settlor of the trusts which her husband had created. It was admitted that the Newberrys had acted mutually in providing for their children, but the court did not agree that one spouse had induced the other to establish the trusts following his or her lead, for a quid pro quo. Love and affection for their children and mutual confidence in having conceived of a wise plan to provide for them were accepted as being the only inducements.

It is not easy to disregard the crossed-powers merely because there was so much love and affection. Perhaps the attempt to avoid taxation, which was strikingly obvious in *Lehman*, was not so evident here. Mr. and Mrs. Newberry were each of independent means, and it was only natural for them to follow a common pattern in the interests of their children. But was the grant of crossed-powers essential for the welfare of the children?

A difference of opinion among the lower courts brought the Supreme Court to speak—though faintly—in the *Lober* decision. In the *Holmes*⁸⁴ case, decided by the Court in 1946, the decedent

⁸¹ Estate of Louise D. Ruxton, 20 T.C. No. 66 (1953); In re Lueder's Estate, 164 F.2d 128 (3d Cir. 1947).

⁸² *Newberry's Estate v. Commissioner*, 201 F.2d 874 (3d Cir. 1953).

⁸³ Estate of Myrtle H. Newberry, 17 T.C. 597 (1951).

⁸⁴ *Commissioner v. Estate of Holmes*, 326 U.S. 480 (1946).

created fifteen-year trusts for the benefit of his children, with contingent remainders limited to others if the beneficiary died within the fifteen years. The decedent retained power to terminate the trusts at any time and distribute principal to the income beneficiary. This retention, ruled the Court, compelled inclusion of the corpus in the settlor's gross estate under Section 811(d), for it gave the decedent power to abolish contingent interests and power to bestow on certain beneficiaries present enjoyment of the property instead of the mere prospect of future enjoyment which they previously had.

Soon after this decision the fifth circuit took up the case of a decedent-settlor who retained power to terminate the trust and distribute the corpus, but who had not created contingent interests that would thereby be cut off.³⁵ The trust was to subsist for the settlor's life, and was for the benefit of her children; if a child predeceased the settlor the child's share was to pass to his "heirs" (and while living one has no "heirs"). The court ruled that Section 811(d) did not apply because the beneficiaries were vested with an equitable fee. Thus the settlor had not retained power to terminate the right of enjoyment or to change the persons who would enjoy the property.

In the *Lober* case the decedent-settlor created trusts the income of which was payable to beneficiaries until they attained the age of twenty-five—and there was no disposition over if the beneficiary died before attaining such age. The decedent retained power to terminate the trust and distribute principal to the beneficiary before he attained the age of twenty-five. The taxpayer argued that the *Holmes* doctrine was not applicable, for here, as in the fifth circuit case, there were no contingent interests to be cut off by the exercise of the power. The Court of Claims assumed that upon the prior death of a beneficiary his share would pass to his "heirs" and therefore each beneficiary had a vested equitable interest.³⁶ Nevertheless, the Court of Claims felt the decedent had the power to determine whether the beneficiary or his "heirs" would use, spend or waste the assets, and not simply the power to accelerate the time of enjoyment. The Supreme Court³⁷ sided with the Court of Claims. The Supreme Court observed whether the beneficiaries' interest was vested or not they did not have full enjoyment of the trust property during the duration of the trust. To gain that enjoyment they would have had to wait until the trust expired were it not for the decedent's power to terminate. His power allowed him to grant the beneficiaries an earlier

³⁵ *Hays' Estate v. Commissioner*, 181 F.2d 169 (5th Cir. 1950). See also *Barney v. Keln*, 4A P-H 1953 Fed. Tax Serv. ¶ 132,612 (D. Minn. 1953).

³⁶ *Lober v. United States*, 108 F. Supp. 731 (Ct. Cl. 1952).

³⁷ *Lober v. United States*, 74 Sup. Ct. 98 (1953). Justices Douglas and Jackson dissented.

enjoyment, and this hold which decedent kept over actual and immediate enjoyment required inclusion of the corpus in the gross estate under Section 811(d).

Life Insurance.—The Tax Court ruled that decedent did not possess an incident of ownership when his employer took out a policy on decedent's life, paid all the premiums, and gave decedent the power to designate a member of his "immediate family" to collect one-half the proceeds received by the employer.³⁸

II

THE ESTATE TAX: NET ESTATE

Marital Deduction.—1953 brought the first federal court decision in respect of the marital deduction. In *Kellar v. Kaspar*³⁹ the decedent provided that his wife was to receive his entire estate, but only if she were living at the time of probate and distribution. Distribution and probate took place within six months after decedent's death, and the wife was then alive. The Commissioner contended that the marital deduction was lost because distribution might not have occurred until more than six months elapsed, and therefore the wife would have had to survive for a period greater than that permitted by the statute.⁴⁰ The court ignored the plain language of the statute and ruled that as the events had occurred within six months and while the wife was alive the estate was entitled to the deduction.

Section 811(j) permits the executor to elect to value the gross estate as of the date decedent died, or as of the optional date of one year later; however, assets distributed within that period must be valued as of the date of distribution. If the decedent leaves property in a marital deduction trust and within one year after his death the trustee makes record entries acknowledging receipt of trust property from itself as executor, is that a distribution for purposes of the optional valuation section? The Commissioner has stated, by private ruling, that the date of distribution is the date the trustee sets up the marital trust, and the trust property will be valued as of that date if the trustee acts within a year of death and the executor chooses the optional date for valuation purposes.⁴¹

Charitable Deductions.—In *Blodget v. Delaney*⁴² the trustee had authority to invade principal (which would otherwise pass for

³⁸ Estate of John C. Morrow, 19 T.C. 1068 (1953).

³⁹ 4A P-H 1953 Fed. Tax Serv. ¶ 132,626 (W.D.S.D. 1953).

⁴⁰ Int. Rev. Code § 812(e) (1) (D).

⁴¹ Fleming, Five Years Experience with the Marital Deduction, 34 Chi. Bar Rec. 247, 250 (1953).

⁴² 201 F.2d 589 (1st Cir. 1953), reversing 16 T.C. 168 (1951).

charitable purposes) for the life-beneficiary's "comfort and welfare." The first circuit considered that "comfort" meant physical comfort, and "welfare" was akin to maintenance and support, and felt these standards to be capable of measurement; so that deduction was allowed.

III

THE GIFT TAX

Taxable Gifts.—In *Harris v. Commissioner*,⁴³ decided by the Supreme Court in 1950, a husband and wife worked out a division of their property and intended the settlement to be in satisfaction of the marital rights of both spouses. The parties expressly stipulated that the agreement was not to become operative unless a divorce decree was entered in a pending action. Their agreement was to be submitted to the divorce court for approval, but it was to survive the decree, and the decree recited that the agreement did so survive. The property transferred by the wife was of greater value than that transferred by her husband. The Commissioner sought to tax this excess value, arguing that the surrender of marital rights was not the full and adequate consideration necessary to support the transfer. The Court held that the excess value of the wife's transfers was not taxable because the transfers were founded on the decree rather than on the parties' promises, and therefore did not have to be supported by full and adequate consideration.

In *McMurtry v. Commissioner*⁴⁴ the *Harris* doctrine was extended by the first circuit. Here the parties entered into a separation agreement which obligated the husband to establish trusts for his wife's benefit in consideration of her release of marital rights. The agreement recited that if a divorce decree were granted the parties' agreement was to remain in effect, and if the divorce court deemed it proper the agreement could be embodied in the decree. The wife promptly secured a divorce, and the decree approved the terms of the agreement; the husband then transferred the property in trust. The Commissioner argued that the *Harris* case could not be relied on, but the court ruled otherwise on the ground that the transfers were not effected until after the entry of a decree which approved the agreement; therefore the transfers were founded on the decree and not on the parties' agreement.

In arriving at this result the court may have brushed aside a crucial fact—here (unlike the *Harris* situation) the property settlement became effective before the divorce was obtained, and its effectiveness

⁴³ 340 U.S. 106 (1950).

⁴⁴ 203 F.2d 659 (1st Cir. 1953).

was not conditioned on the grant of a decree. Thus, it could be said that the settlement was binding and operative as a result of the parties' agreement and not as a consequence of the court's sanction.⁴⁵

In the *Berger*⁴⁶ case the taxpayer's husband created an unfunded insurance trust of policies on his life. Upon his death income was payable to his wife (the taxpayer) and other beneficiaries. For several years premiums on the policies were paid by the wife-taxpayer, but the Tax Court ruled that these payments were not taxable as gifts because she lacked donative intent. The second circuit felt that the absence of donative intent was not pertinent. Anyway, the court felt that donative intent was probably present because the premium payments exceeded what was necessary to protect the wife-taxpayer's interest in the trust, and she had not sought to recover from the other beneficiaries this excess amount which was providing protection for them. The court held that the amount of premiums paid by the wife-taxpayer in excess of the value of her interest in the trust was a gift.

A donor who purchases a piece of jewelry, pays the 20 per cent federal excise tax, and then makes a gift of the bauble may receive a jolt when he reports the gift for gift tax. The third circuit⁴⁷ has reluctantly but flatly endorsed the second circuit's⁴⁸ previous ruling that the value of the taxable gift includes the excise tax paid on the purchase. The second circuit rested its opinion on a provision in the excise tax statute which forbids a seller to represent that the purchase price does not include the excise tax. The third circuit chose to lean on the regulations, which say that for gift-tax purposes value is the price at which the item would change hands between a willing seller and buyer. The court concluded that both seller and buyer would calculate the excise tax in determining the price, thus the tax was part of the value to be reported for gift tax.

Exclusions.—There were no court decisions as to what interests passing to infants are "present interests." The Commissioner did, however, acquiesce in two cases which involved a trustee's power to accumulate the unexpended part of an infant's income, and in which the court held that the infant was nonetheless given a present interest in the income of the trust. In *Commissioner v. Sharp* the trustee had discretion as to the manner in which the infant's income was to be paid or applied—but there was also a provision that unexpended

⁴⁵ See *Rosenthal v. Commissioner*, 205 F.2d 505 (2d Cir. 1953) and *Bank of New York v. United States*, 115 F. Supp. 375 (S.D.N.Y. 1953), holding that this fact precludes application of the Harris doctrine.

⁴⁶ *Commissioner v. Berger*, 201 F.2d 171 (2d Cir. 1953).

⁴⁷ *Publicker v. Commissioner*, 206 F.2d 250 (3d Cir. 1953).

⁴⁸ *Duke v. Commissioner*, 200 F.2d 82 (2d Cir. 1952), cert. denied, 345 U.S. 906 (1953).

income should be accumulated and paid over to the infant upon attaining majority. The court held that the provision which permitted such accumulation was only precautionary and did not cut down the infant's absolute interest.⁴⁹ In *Edward J. Kelly* the unexpended income was to be invested in like manner as was provided for the investment of principal and the court held that the language in the *Sharp* trust instrument was indistinguishable.⁵⁰

IV

CONCLUSION

The 1953 tranquillity in this field may be the calm before changes that are in the making. Although estate and gift taxes do not attract as much attention as the income tax, perhaps the pending general revision of the federal tax system will also bring a little order to some corners of this field that are still chaotic.

To try to catalogue everything that ought to be done would be beyond the scope of this article. Two items deserve brief mention.

Something ought to be done to make unnecessary the wretched drafting that is indulged in by some practitioners who feel that it is always essential somehow to provide that the surviving spouse will receive precisely one-half (and not one cent more) of the adjusted gross estate. Why not make eligible for the marital deduction a testamentary provision by which the surviving spouse is empowered—within a stated time after the date of death—to take from the general testamentary estate, or from a nonqualified trust, such sum as she elects, but so that she will not receive, in the aggregate, more than one-half of the adjusted gross estate?

And much of the complexity and confusion that surround the deduction for property previously taxed could be eliminated if the suggestions in two recent papers were heeded.⁵¹

⁴⁹ *Commissioner v. Sharp*, 153 F.2d 163 (9th Cir. 1946), Commissioner acquiesced, 1953 Int. Rev. Bull. No. 8 at 1 (1953).

⁵⁰ *Estate of Edward J. Kelly*, 19 T.C. 27 (1952), Commissioner acquiesced, 1953 Int. Rev. Bull. No. 8 at 1 (1953).

⁵¹ Bittker & Frankel, *Previously Taxed Property and the Federal Estate Tax*, 8 Tax Law Rev. 263 (1953); Rudick, *The Estate Tax Deduction for Property Previously Taxed*, 53 Col. L. Rev. 762 (1953).

STATE AND LOCAL TAXATION

JEROME R. HELLERSTEIN

I

TAX COLLECTIONS AND LEGISLATION

STATE and local tax collections soared to a new high of \$19.3 billion in 1952, an increase of \$1.8 billion over 1951; state and local revenues accounted for nearly one-fifth the federal, state and local total collections for 1953 of \$80.9 billion. A significant development in state taxation is the increasing fiscal importance of general sales, use and gross receipts taxes, which in 1952 were the largest single source of state revenues, accounting for 22.6 per cent of all such tax receipts.¹

The state legislatures were extremely active in the tax field during 1953.² The more significant new statutory developments were the adoption by Michigan of a new type of gross receipts tax, which seeks to tax the "value added" at each stage in the economic process, and the enactment by Pennsylvania of a 1 per cent sales and use tax. Connecticut increased its sales and use tax rate from 2 per cent to 3 per cent and North Dakota and Rhode Island voted to continue their temporary levies for another two years. Gasoline, cigarette and alcoholic beverage tax rates were increased in a number of states. Five states either decreased income taxes or continued temporary reductions of prior years; only in Delaware were the rates substantially increased. Corporate tax rates, on the other hand, were raised in a number of states and new oil and gas severance levies were adopted by five Western states. A new levy on trucks and other motor vehicles was adopted in Ohio and rates under existing taxes were raised in a number of states.³

II

COMMERCE CLAUSE

Pennsylvania "Property Tax" as Applied to Exclusively Interstate Business.—The states are not expected to remain idle while the

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¹ The figures used in the text are taken from *Total Tax Collections in 1952*, 20 *Tax Policy* No. 9 (Sept. 1953).

² The comment on state tax legislation is based on *CCH State Tax Review*, Oct. 22, 1953.

³ Among the writings during the year were Eastland, *The Graduated Gross Receipts Tax in Texas*, 31 *Texas L. Rev.* 570 (1953); Fordham, *Local Income Taxation—a 1953 Addendum*, 101 *U. of Pa. L. Rev.* 1178 (1953) (a supplement to an extended paper on the same subject published in 1950); Long, *Taxation in Massachusetts*, 32 *B.U.L. Rev.* 375 (1952); Teschner, *The Death of a Tax*, [1953] *Wis. L. Rev.* 76.

Supreme Court narrows the area of state taxation under the commerce clause. In an effort to avoid the restrictions of the *Spector*⁴ case and its reinvigoration of the doctrine that a state tax on the privilege of doing business may not be imposed on a foreign corporation engaged in an exclusively interstate business, the Pennsylvania Legislature enacted a so-called property tax. For some years Pennsylvania has had a net income tax applicable to domestic and foreign corporations doing business in the state or having property or capital employed in the state; the tax is allocated under a three-factor Massachusetts-type formula. To deal with the contingency that this tax may be held unconstitutional as applied to a foreign corporation engaged solely in interstate commerce, the Pennsylvania Legislature enacted a supplementary tax, which it has entitled a "property tax." Only those corporations not subject to the income tax are subject to the so-called property tax. Unlike the income tax, the property tax is not levied on corporations "doing business" in the state but instead on corporations "carrying on activities" or "owning property" in the state. The attempt to bring the tax within the *Memphis Gas*⁵ decision is, of course, apparent. A singular feature of this "property tax" is that the measure of the levy is not "property" but net income—net income allocated to the state under a formula in many respects similar to the formula used in the income tax; likewise, the rate is the same as the net income tax rate.

At first glance, one is tempted to dismiss the new levy as a mere spurious exercise in semantics, but on closer analysis it appears that Pennsylvania may have a firmer basis for its commerce clause avoidance technique. When the Supreme Court invalidated the 1894 federal income tax, it did so on the ground that the federal constitutional requirement that direct taxes be apportioned among the states in proportion to population was violated.⁶ The Court's theory was that a tax on income from property is a property tax and hence a direct tax violating the apportionment requirement. While later Supreme Court decisions have expressed doubts as to the notion that an income tax is a property tax,⁷ nevertheless, some state supreme courts, including the Pennsylvania court, have invalidated graduated personal income taxes on the theory that they are property taxes and as such violate state constitutional requirements of uniformity or equality in taxation.⁸ In the first case arising under the new Pennsylvania so-called property tax, the trial court held the levy to be a

⁴ *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602 (1951).

⁵ *Memphis Natural Gas Co. v. Stone*, 335 U.S. 80 (1948).

⁶ *Pollock v. Farmers Loan and Trust Co.*, 157 U.S. 429 (1895).

⁷ *New York ex rel. Cohn v. Graves*, 300 U.S. 308 (1937).

⁸ *Kelly v. Kalodner*, 320 Pa. 180, 181 Atl. 598 (1935).

property tax and sustained it as applied to a foreign corporation engaged in transporting freight by truck to and from Pennsylvania.⁹ The taxpayer in that case maintained no terminal in Pennsylvania; it solicited no business in the state, accepted no orders and received no payments in the state; no employees of the taxpayer, other than its truck drivers, operated in Pennsylvania. In upholding the levy as a direct tax on income and hence as property tax, the court relied on the *Memphis Gas* case and the *West Publishing*¹⁰ case. The fate of this levy, which is now pending on appeal in the Pennsylvania courts, will bear watching, since if this technique succeeds, it may open a new avenue for now forbidden state taxation under the commerce clause.¹¹

Application of De Minimis Rule to Local Activities of Airline to Invalidate Franchise Tax.—A New York appellate court has extended the commerce clause immunity of an interstate airline from local taxation by applying the *de minimis* doctrine.¹² The city of New York sought to apply its tax on the doing of business in the city, measured by allocated gross receipts, to United Airlines, which carries only interstate traffic in the city. Nevertheless, the airlines carries on large operations in the city, where it maintains one of its principal terminals, traffic offices, a hangar, a repair and maintenance shop, and a stock room of parts and supplies. All these were held by the court to be essential parts of the interstate operation and therefore such activities could not be made the subject of a local tax. However, that was not all—in addition, United Airlines sells some airplane parts to other lines and provides maintenance for other lines, produc-

⁹ *Roy Stone Transfer Co. v. Messner*, 64 Dauph. 240 (Pa. 1953).

¹⁰ *West Pub. Co. v. McColgen*, 328 U.S. 823 (1946).

¹¹ There were two comprehensive articles published during the year reviewing Supreme Court decisions in the commerce clause field. Barrett, "Substance" vs. "Form" in the Application of the Commerce Clause to State Taxation, 101 U. of Pa. L. Rev. 740 (1953); Hartman, State Taxation of Interstate Commerce, 3 Wash. U.L.Q. 233 (1953). Both support the proposal made by other writers in the field that Congress enact legislation regulating state taxation of interstate businesses. See also Note, State Taxation of Vehicles Moving Interstate: The Intervention of the Supreme Court, 28 Ind. L.J. 212 (1953).

¹² *United Airlines, Inc. v. Joseph*, 282 App. Div. 48, 121 N.Y.S.2d 692 (1st Dep't 1953). A similar problem is presented by *Railway Express Agency, Inc. v. Commonwealth*, 194 Va. 757, 75 S.E.2d 61 (1953), in which the court upheld an annual license "imposed on the privilege of doing business" measured by gross receipts as applied to an exclusively interstate express business. The court sustained the levy on the theory that the tax is a "property" tax, "an intangible property tax based on the augmentation in value of the physical assets of the taxpayer arising out of the use of these physical assets as a unit of commerce; this value added being measured by the volume of business done in this State." Either this is mere gibberish or the term "property tax" is by this court's definition so all embracing as to cover virtually every prescribed levy on the doing of an interstate business, a definition which the present Supreme Court is not likely to accept.

ing an annual revenue of about \$12,000. United is also a member of Airlines Clearing House, and as such sells in New York City tickets for intrastate passage on other lines. These activities were concededly intrastate; indeed, United had paid the disputed tax thereon, thereby recognizing that it was doing an intrastate business. The court, however, dismissed these activities as *de minimis* and held that they could not lay a foundation for subjecting to tax the \$5,000,000 to \$6,000,000 of annual transportation revenues out of \$18,000,000 to \$27,000,000 throughout the country which the city sought to tax. In reaching this conclusion, the court misreads Supreme Court decisions. The cases do not support its statement that a gross receipts tax for the privilege of doing intrastate local business must be reasonably and at least approximately apportioned in relation to the local incidents which have resulted in the taxpayer being subject to the tax. On the contrary, the law has long been established that once a local business is carried on, the state now having a local subject of tax may measure that tax by the receipts from exclusively interstate operations, which could not previously have been made the subject of the levy.¹³ And when the court seeks to justify this result by applying the *de minimis* rule, it is breaking new ground in restricting state taxation under the commerce clause.

Justice Brietel's opinion and decision, though not supported by the cases, are supported by logic. If an airline's transportation activities may not be taxed by the state because to do so would unduly burden the commerce, it would seem reasonable that local sales of parts should result only in a tax measured by such sales, whether \$12,000 a year or \$12,000,000 a year, and that the transportation receipts should be nontaxable. The logic of this position, however, reveals the unreality of the entire doctrine, reaffirmed in the *Spector* case, that a tax on the conduct of an exclusively interstate business, though fairly allocated to the business done in the state, violates the commerce clause. For if the burden on commerce of a doing-business tax is so serious as to compel the states to grant immunity to exclusively interstate business, then there can be little justification, merely because there is a local activity such as local repairs or some admittedly local sales which is ancillary to the major business of making interstate sales, to permit the measure of the tax to include the proceeds or receipts or income of the otherwise proscribed interstate sales. The fact is that the whole *Spector* doctrine adjudges "burden" by an unreal conceptualism which has no place in modern constitutional law. If economic instead of metaphysical standards of

¹³ *Cheney Brothers Co. v. Massachusetts*, 246 U.S. 147 (1918); see *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602 (1951).

"burden" are to govern, the states' powers of taxation under the commerce clause to impose doing-business taxes measured by fairly allocated receipts should be sustained as applied to the exclusively interstate, the interstate-intrastate and the entirely intrastate business.¹⁴

Attacks on the Taxability of Inseparably Intermingled Interstate and Intrastate Business.—A little-noticed development, still in its incipient stages, is emerging in the Supreme Court which, if it receives acceptance of the full bench, will restrict state taxation of interstate businesses by another approach. The law heretofore appears to have been settled, at least since 1936, that a state franchise or other excise tax on a local activity will not be invalidated merely because the local activities are inseparable from nontaxable interstate activities.¹⁵ The Supreme Court at the last term reversed a decision of the Illinois Supreme Court which had invalidated a City of Chicago tax on trucks used in local and interstate business and on the ground that such a levy violates the commerce clause.¹⁶ The Court could have sustained the levy in short order by citing the earlier cases dealing with the inseparability argument, as indeed did two justices who concurred. The significance of the decision may lie in the pains which Mr. Justice Frankfurter writing for the majority took in order to avoid such a result; the language used suggests the Court's lack of sympathy for allowing the states to tax an inseparably intermingled local and interstate business. The tax was upheld but on a completely different ground—an extension of the rationale of the *Northwest Airlines* case¹⁷—by holding that the "home" of the trucking business was Chicago, that the hub of its business was Chicago and as such is taxable there. One justice, surprisingly Mr. Justice Douglas, dissented because he thought an occupational tax may not be levied on a business which cannot separate its local from interstate business and continue to operate.

On the same day the Court handed down another decision which

¹⁴ The New York Appellate Division seems determined to cripple the City of New York in its efforts to tax businesses which have been traditionally regarded as taxable by stretching the immunity granted by the commerce clause to hitherto (at least in recent years) unknown lengths. In *United Piece Dye Works v. Joseph*, 282 App. Div. 60, 121 N.Y.S.2d 683 (1st Dep't 1953) it held that a corporation engaged in a service industry drying greige goods (it appears doubtful that the taxpayer was engaged in interstate commerce at all) and carrying on extensive local activities in connection therewith in New York City was engaged exclusively in interstate commerce and could not be subjected to the New York City doing-business tax measured by allocated gross receipts.

¹⁵ *Pacific Telephone & Telegraph Co. v. Tax Comm'n of Washington*, 297 U.S. 403 (1936).

¹⁶ *Chicago v. Willett Co.*, 344 U.S. 574 (1953).

¹⁷ *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292 (1944).

upheld an Illinois state tax on motor vehicles using the public highways measured by the gross weight of the vehicle.¹⁸ The principal contention made by the parties was that the levy was invalid under the commerce clause. The majority of the Court found no commerce clause issue in the case since each of the carriers did both an intrastate as well as an interstate business. Mr. Justice Frankfurter wrote a dissenting opinion joined in by Mr. Justice Jackson in which he argued that:

The taxation and licensing by the States of commingled, though not necessarily inextricably commingled, intrastate and interstate business, or of the instrumentalities of such commingled business, have again and again been considered here to determine whether such an assertion of the taxing power by the States had, in its practical incidence, cast an inadmissible burden upon the interstate aspect of the joint enterprise.¹⁹

License Tax as Applied to Itinerant Photographer.—The Alabama court has sustained a state license tax on itinerant photographers which strongly smacks of an effort to discriminate against out-of-state photographers.²⁰ The statute levies a license tax on photographers and photographic galleries (in an amount curiously not stated in the court's opinion) and a larger tax on "each transient or travelling photographer," in the amount of "five dollars per week." A photographer employed by a Tennessee corporation came into Alabama to take photographs of persons whose orders had already been solicited by salesmen, and was convicted for failing to obtain a license and pay the tax on itinerant photographers. Admittedly, the levy could not have been imposed on the solicitors; such fixed-fee license taxes have long been invalidated by the Supreme Court as obviously aimed at the out-of-state vendor.²¹ The Alabama court closes its eyes to the discriminatory objective of the statute and concludes that the drummers' license cases are inapplicable because the photographer is engaged not in solicitation for the out-of-state employer (which is now established to be an interstate activity) but instead in a local activity not protected by the commerce clause. This distinction is unwarranted if interstate business is to be protected by the court from discriminatory levies; in the light of the courts' long history of astuteness in preventing discrimination against out-of-state

¹⁸ Bode v. Barrett, 344 U.S. 583 (1953).

¹⁹ Id. at 588.

²⁰ Graves v. State, 258 Ala. 359, 62 So.2d 446 (1953).

²¹ See Nippert v. City of Richmond, 327 U.S. 416 (1946), and cases there collected. For a property tax case upholding a levy on grain in the hands of a broker sold for shipment interstate, following *Coe v. Errol*, 116 U.S. 517 (1886), see *In re Review of Assessment of Personal Property of T.W. Jones Grain Co.*, 156 Neb. 822, 58 N.W.2d 212 (1953).

business, no matter how well disguised, this application of the levy should have little chance of survival in the higher Court, if the case is heard by that tribunal.

III

FRANCHISE TAXES

Apportionment of Franchise and Business Income Taxation of Receipts from Sales.—A method commonly used among the states in apportioning gross receipts from sales was attacked in a District of Columbia franchise tax case. The statute imposes a levy which is measured by net income "derived from sources within the District." Under regulations promulgated by the District Commissioners, gross receipts derived from sales are allocated to the District in the proportion that gross income from District sales bears to gross income from all sales. District sales are defined as those "principally secured, negotiated or effected by employees, agents or branches" of the taxpayer "located in the District."²² The taxpayer contended that the District Commissioners were unauthorized under the broad powers granted them to prescribe allocation methods and formulae to allocate to the District the receipts from any sale where title passed outside the District. The court, reviewing the legislative history of the provision, concluded that there was no warrant for restricting "income derived from sources within the District" to sales as to which title passed in the District; and it found no due process of law infirmity in the allocation method prescribed.²³ To have held otherwise would have put a premium on the very types of legal formalities, capable of ready manipulation by the taxpayer, which allocation formulae are designed to prevent.

IV

GROSS RECEIPTS, SALES AND USE TAXES

Release of Liability of Mortgagor and Subsequent Payment of Mortgage as Gross Income.—Under the Indiana gross income tax, if B pays A's debt, A has realized gross income. The Indiana court

²² For states which employ a similar sales allocation method see Silverstein, *Problem of Apportionment in Taxation of Multistate Business*, 4 Tax L. Rev. 207 (1949).

²³ *Lever Bros. v. District of Columbia*, 204 F.2d 39 (D.C. Cir. 1953). The court also construed the term "carrying on a commercial activity" as including extensive solicitation by salesmen which results in a large volume of sales and shipments to customers in the District from non-District points; hence under the statutory definition, the taxpayer was "doing business" in the District. See also *Owens-Illinois Glass Co. v. District of Columbia*, 204 F.2d 29 (D.C. Cir. 1953). It is to be noted that recent Supreme Court decisions have re-established the holding that such solicitation and sales do not constitute "doing business" in the state under the commerce clause so as to warrant the imposition on a foreign taxpayer of a franchise tax. See *Memphis Steam Laundry Cleaner, Inc. v. Stone*, 342 U.S. 389 (1952).

had before it a case in which A, a real estate builder, erected houses, obtained mortgages thereon and then sold the houses to customers; in connection with the sales, the customers assumed the mortgages and A was released from liability. A second type of transaction involved the case in which A was not released from liability but instead the customer assumed the mortgage and later paid it. The Indiana Revenue Board contended that A realized gross income either when it was relieved of its liability or when the customer assumed it, or when the customer paid off the mortgage. In a highly literal opinion, the court held that A realized income at no point.²⁴ A realized no income when its liability was discharged by the agreement with the customer because, said the court, the statute covers only "payment" of a debt; discharge or the equivalent of payment produces no income. And A realized no income when the customer paid the mortgage (where there was no prior discharge) because the payment was not, as required by the statute, for A's "direct benefit" although concededly A benefited indirectly. This stultified interpretation of the statute enables the person who obtains a mortgage on property, and thereby obtains part of the final sales price, to escape the full tax paid by the vendor who sells unmortgaged property.

Exclusion from the Measure of Utility Tax of Income Realized on Acquisition of Bonds at a Discount.—The City of New York imposes a tax on utilities doing business within its borders measured by gross income from utility service rendered within the city; the statute also includes "gains or profits from any source whatsoever" as gross income. Lehigh Valley Railroad, which carries on a utility business only a "negligible part" of which is conducted in the city, acquired its own bonds through New York Stock Exchange transactions at a substantial discount. Concededly this discount constituted "gross income," as that term is defined by the statute, and the city contended that this income was taxable (a) because the transactions were consummated on the New York Stock Exchange and (b) as gross income falling within the meaning of the statute, irrespective of its source. The court set aside the levy, determining that this income "did not truly result from any local operation or activity" and concluded that it "would not be appropriate or allowable to allocate such a gain to a locality where the bonds happened to be purchased."²⁵ Apparently the court was motivated in part by the fact that the principal office and the center of operations, as well

²⁴ Indiana Dep't of State Revenue v. Colpaert Realty Corp., 109 N.E.2d 415 (Ind. 1952); see also Department of State Revenue v. Crown Development Co., 109 N.E.2d 426 (Ind. 1952).

²⁵ Lehigh Valley R.R. v. Joseph, 281 App. Div. 57, 117 N.Y.S.2d 170 (1st Dep't 1952).

as most of the trackage of the railroad, were located outside the city.

Photographic Films as Ingredient of Manufacture.—An Alabama court reversed itself on rehearing in a use tax case involving the taxability of photographic films sold to photographers and the use of such films by the photographer.²⁶ The statute taxes retail sales but exempts "wholesale sales." A "wholesale sale" includes a sale of tangible personal property "to a manufacturer . . . which enters into and becomes an ingredient or component part of the tangible personal property" sold to the customer. The taxpayer, a Tennessee photographer, solicits in Alabama orders for photographs where sittings are held and the films exposed in that state. The exposed negatives are sent to the taxpayer's Tennessee office where the films are developed, printed and processed. No part of the developed film becomes a part of the photograph delivered to the customer in Alabama; after it is developed, the film is printed by placing the negative next to sensitized paper; the transmission of light through the negative onto the print paper creates the image thereon, which is brought out by immersions in developing solutions.

In its original opinion, the court held that photography is, like newspaper publication, a manufacturing process and that the films are an ingredient of manufacture, like newspaper ink. The conclusion that photography is for this purpose manufacturing appears reasonable but the conclusion that the film becomes an "ingredient" or "component" of the photograph delivered to the customer seems questionable. Physically the film does not, of course, become a part of the article delivered to the customer. The film, instead, would appear to be more closely akin to the chemicals or the bulbs and lamps used in the developing process, which clearly are not exempt as wholesale sales. In justifying its original holding that that transaction was an exempt wholesale sale, the court relied on the fact that the negative is "worthless for any other use" after its use by the photographer. That is true, but the statute has not made the use of an article in manufacture the test of "wholesale sale"; the test is that the article physically becomes an ingredient or component of the article delivered to the customer, which is not here the case.

On rehearing, the assessment was upheld on the ground that the ingredient of manufacturing exemption applied only where the manufacturing takes place in the state. Although the films had been "used" in the state through the taking of the photographs there the exemption did not apply since the "manufacture" of the films into

²⁶ State v. Olan Mills, Inc., 258 Ala. 303, 63 So.2d 796 (1953).

prints took place in Tennessee. This is a provincial reading of the exemption provision, for which no warrant appears in the statute.

Theft of Liquor as a Sale.—In an alcoholic beverage sales tax case, the New Jersey taxing authorities took the startling position that a theft of liquor from a truck constituted a delivery and hence a taxable sale. Several sealed trailers loaded with cases of whiskey were stolen while in New Jersey en route from Kentucky and Indiana to New York; they had been parked overnight at licensed New Jersey terminals. The statute imposes a tax on any "sale" of alcoholic beverages in the state upon any "delivery" made in the state. The state Department of Treasury taxed the theft as sales made by deliveries within its boundaries. The basis for the state's position was that the statute, in addition to taxing "sales" as the term is ordinarily used, also provides that alcoholic beverages "stolen or otherwise disposed of . . . shall be deemed to have been sold." As the dissenting opinion by Justice Jacobs, joined in by Chief Justice Vanderbilt, points out, one of the troublesome problems confronting the state "resulted from claims often suspect that liquor which had admittedly been in the possession of the licensees had disappeared through theft or otherwise and should not be taxed as though sold."²⁷ The majority of the court held that the provision in question related solely to persons making sales in the state in violation of federal or state law and had no application to a theft of goods from the trucker and held that a taxable sale requires a voluntary delivery in the state by the licensee. The dissent, on the other hand, took the position that any time alcohol is transported into the state and the liquor actually leaves the state there is no tax, but that the licensee has the absolute duty to establish that the liquor has been removed from the state if it is to escape tax. This view may have more merit to it than appears on the surface in view of the history of gangsterism and the influx of ex-bootleggers into the liquor industry.

The majority was also of the view that the construction of the statute contended for by the state would result in a denial of equal protection of the law and in a violation of the interstate commerce clause. In view of the lengths to which the Supreme Court has gone in sustaining, under the Twenty-First Amendment, state restrictions on intoxicating liquors imported into the state, it appears unlikely that the Court would deny to the states the power to impose on a trucker bringing liquor into the state the duty of establishing

²⁷ *Motor Cargo, Inc. v. Division of Tax Appeals*, 10 N.J. 580, 592, 92 A.2d 774, 780 (1952).

that the goods have actually been removed from the state if the tax is to be avoided.²⁸

V

DEATH TAXES

Bequest for Saying of Masses.—The taxpayer's will directed her executrix to expend portions of her residuary estate for masses according to the ritual of the Roman Catholic Church for the repose of her soul and the souls of her parents and brothers. No contention was made that the bequest was exempt from inheritance tax under any religious bequest provision; instead the estate contended that no tax was payable because there was no identifiable person to whom the bequest was made. The Ohio statute is an inheritance tax imposed on the beneficiary and the lower court, agreeing that the reference to masses did not identify any priest or church who would receive the bequest, accordingly set aside the levy. The state supreme court, however, reversed, taking the position that the executor became the trustee of the gift, with such priest as he might select as the cestuis que trust, and that there was therefore a sufficient identification of the taxable legatee.²⁹

Federal Tax Refund as Asset of Estate.—An unusual estate tax issue arose out of a change in the federal income tax law. When the executor filed the federal income tax return for the year in which the decedent died, 1939, he included in taxable income, as required by the then law, dividends accrued but not paid prior to the decedent's death. The estate's inheritance tax was settled on the basis of the allowance of a deduction for the federal income tax as shown in the return. In 1942, Congress changed the law retroactively so as to exclude such accrued unpaid dividends from a decedent's final return, in consequence of which the estate received a tax refund. The state

²⁸ In *Craig-Tourial Leather Co. v. Reynolds*, 87 Ga. App. 360, 73 S.E.2d 749 (1952) the court decided an issue as to which cases are in conflict, namely, whether sales of leather to shoe repairers for use in resoling and heeling shoes and general repair work is a taxable sale. It held that the shoe repairer consumes the leather and is therefore subject to sales tax on his purchases and is not required to collect tax from his customers.

In *W. S. Libbey Co. v. Johnson*, 94 A.2d 907 (Me. 1953) the court held the vendor under a sales tax liable for the difference between taxes collected from its customers under the required bracket collection schedules and the 2 per cent tax payable under the law on the theory that the vendor is liable for a 2 per cent tax irrespective of the amount collected by him.

In *City of Marietta Hospital Authority v. Redwine*, 87 Ga. App. 629, 74 S.E.2d 670 (1953) the court found ample evidence in the legislative history of the sales tax to conclude that the exemption from the levy of sales made to "the State of Georgia, and county or municipality of said State" did not encompass sales to a city hospital authority.

²⁹ In *re Shanahan's Estate*, 159 Ohio St. 487, 112 N.E.2d 665 (1953).

now claims a tax on the amount of the refund. The court set aside the tax on the ground that the refund was not an asset of the estate as of the date of death but was analogous to a gift after death to the decedent.⁸⁰ The analogy, however, may be misleading; this is a case in which the estate has obtained a deduction for a federal income tax paid. So long as the statute of limitations is open, it is difficult to see why the estate should benefit from such a deduction where the tax is finally determined not to have been payable and is refunded, whether as a result of administrative or legislative action.

VI

PROPERTY TAXES

Proof of Upward Trend in Values as Affecting Property Tax Assessments.—A decision of the New York Appellate Division reflects a changing approach toward real estate tax assessments. The issue before the court was the valuation of two office buildings in the Grand Central station area of New York City for the years 1944 to 1949. The assessors had fixed the valuations at \$6,100,000 for each of the years, but the trial court had reduced the valuations to \$5,520,000. The appellate court analyzed the evidence and found an upward trend during the years in question—increased gross and net income, substantial improvements in the buildings and increased reproduction costs. After referring to the area, as described by the city's expert, as "the finest type commercial and retail area in the City of New York" experiencing a "continuous upward trend," the court reinstated the assessments made by the Tax Commission, saying:

Assessments cannot be made to trail behind every turn in the fortunes of real property. There are times when property must bear a share of taxation proportionate to value even though it may then have no income, or an income inadequately focused to true value. There are times when the full measure of ephemeral surges of increased income should not be reflected in assessments in fairness to the owner.

But income is one factor which a court must weigh into consideration in undertaking to review, and to revise; the judgment which assessing officers have applied to their tasks. When a general trend of increases in values for an area is shown; when there is proof both of actual physical improvements to the structures and marked increases in depreciated reconstruction costs; and, finally, when there are dramatic increases in net income which appear sustained rather than spasmodic,

⁸⁰ In re McCandless' Estate, 374 Pa. 551, 97 A.2d 807 (1953). The New Jersey Supreme Court has reaffirmed a decision handed down in 1930 holding that the state death tax does not reach the transfer of intangibles to an irrevocable trust, where the transferor retained income for life, in a case in which the decedent died a domiciliary of the state but was a nonresident when the transfer was made. Hooton v. Neeld, N.J. 396, 97 A.2d 153 (1953).

the changes reflected in the decision of the assessors should be reflected also in the order of the court.⁸¹

Property Taxes on Boats and Barges.—The Kentucky court has rejected, as applied to taxation by various counties within the state, the interstate principle of apportioning property taxes between the states in which a boat moves.⁸² Boats and barges moving along rivers in Kentucky operated in several counties of the state. On recommendation of the State Revenue Commissioner, the property was assessed by the various counties on an allocated basis measured by the ratio of river miles traveled within the county. The court recognized that this method is proper in the interstate commerce field where there is no state authority which can otherwise direct assessment. Here, however, the court pointed out that the legislature requires the listing of property "where it is located"; unless there is clear legislative direction to the contrary, the court regarded it as proper to follow the time-honored principle of assigning a single "situs" to property for tax purposes, that situs being the domicile of the taxpayer. Accordingly, the court held that only the county in which the owner had its domicile could tax the property but that county could tax the full value of the boats.⁸³

⁸¹ *People ex rel. 379 Madison Ave., Inc. v. Boyland*, 281 App. Div. 588, 121 N.Y.S. 2d 238 (1st Dep't 1953).

⁸² *Ashland Oil & Refining Co. v. Department of Revenue*, 256 S.W.2d 359 (Ky. 1953).

In a suit by the Town of Brattleboro to recover property taxes the defense was that the defendant, as the remainderman, with the property being occupied by the life tenant, was not liable for the levy. The statute provides for listing property to the "last owner or possessor" thereof on April 1 of each year; the defendant argued the duty to pay real estate taxes is on the life tenant. The court recognized this to be the common-law rule but concluded that the legislature has imposed the duty to pay taxes on any "owner" and that the holder of a remainder interest is an owner. *Town of Brattleboro v. Smith*, 94 A.2d 407 (Vt. 1953).

A personal property tax exempts "any new farm machinery, horse or power drawn, stocked and owned by a retailer for farm use." The plaintiffs, dealers in farm machinery, were taxed on three new farm tractors held by them for sale. In *Mitchell v. City of Holicon*, 264 Wis. 350, 59 N.W.2d 469 (1953) the court denied the exemption, holding that "self-propelled" farm machinery is not exempt but only the machinery drawn by the power unit. This appears to be an unwarranted restriction on the exemption, which was designed to encourage the stocking, sale and use of powered farm machinery.

Machinery and equipment in process of construction for use in a manufacturing plant being built was not taxable as personal property "used in business." *National Distillers Corp. v. Peck*, 158 Ohio St. 369, 109 N.E.2d 493 (1952).

⁸³ For writings during the year in the property tax field, see the continuation of the comprehensive study of property taxes in California by Holbrook & O'Neill, *California Property Tax Trends: Part III*, 25 So. Calif. L. Rev. 395 (1952); Spear, *Review of Tax Assessments Involving Individual Owners of Real Property*, 32 Neb. L. Rev. 395 (1953); Sweig, *The Front Foot Rule in Special Assessments*, 27 Conn. B.J. 26 (1953); Note, *Taxation of Machinery and Tools Used in a Manufacturing or Mining Business*, 39 Va. L. Rev. 249 (1953).

VII

TAX EXEMPTIONS

Occupational License Tax as Applied to Naval Ordnance Employees Working on Federal Land.—Employees at a federal ordnance plant located on land owned by the United States challenged the validity of a tax imposed by the City of Louisville, within whose borders the plant was located,³⁴ levied on persons engaged in any trade, occupation or profession within the city. An annual "license or privilege fee for the privilege of engaging in such activities," measured by 1 per cent of salaries, wages and the net profits of trades, businesses or professions, is imposed. The taxpayers argued that the state and localities are not authorized to tax the privilege of working on federal land although located within a state, as to which the Supreme Court has said, "exclusive jurisdiction over the area still remains with the United States, except as modified by statute." Here, Congress had modified that jurisdiction by the enactment of the Buck Act, which declares that no "person shall be relieved from any income tax levied by any state, or by any duly constituted taxing authority therein" by reason of the federal nature of the area; the issue was whether the term "income tax," which Congress had defined for this purpose to mean "any tax levied on or with respect to or measured by net income, gross income, or gross receipts" embraced the Louisville license tax.³⁵ The majority of the Court in an opinion by Mr. Justice Minton held the tax to be an "income tax" within the meaning of the Buck Act since it was measured by gross receipts, despite the holding of the Kentucky court that the levy was not an income tax within the meaning of the Kentucky Constitution.³⁶ Justices Douglas and Black dissented on the ground that the levy was, as the Kentucky court had held, a "license fee" levied on the privilege of engaging in stated activities, whose measure was narrowly confined to salaries, wages, commissions and the net profits of businesses, professions and occupations, with dividends, interest and capital gains excluded, and hence not the type of levy consented to by Congress.³⁷ In reaching its conclusion, the dissent, by declaring that "the Congress has not yet granted local authorities the right to tax the privilege of working for or doing business with the United States,"³⁸ appeared to ignore the sweeping grant of authority to the states to apply to federal employees and land any levy measured by gross or net income.

³⁴ There was a controversy in the case as to whether the city properly annexed the area. The court sustained the validity of the annexation.

³⁵ 61 Stat. 641 (1947), 4 U.S.C. §§ 105-10 (Supp. 1952).

³⁶ *Howard v. Commissioners of Sinking Fund of Louisville*, 344 U.S. 624 (1953).

³⁷ *Id.* at 629.

³⁸ *Ibid.*

Tax Immunities of Contractors with the Atomic Energy Commission.—The scope of *Carson v. Roane-Anderson Co.*,³⁹ in which the Atomic Energy Act was held to immunize from sales tax purchases made by contractors with the Atomic Energy Commission on the theory that they were "agencies" of the Commission whose activities as such were covered by the congressional exemption, is being tested in the state courts. The Washington Supreme Court refused to apply the case to a business and occupation tax levied on General Electric Company, which produces fissionable materials at the federal atomic energy plant under federal supervision.⁴⁰ The Arkansas court upheld a sales tax assessment on goods purchased for use in carrying on an Atomic Energy Commission contract where it found that the contractor and not the United States was the contractor.⁴¹ These efforts by the state courts to restrict the impact of the *Roane-Anderson* case, which is a significant threat to revenues in some states, are destined to evoke further Supreme Court action.⁴²

Taxability of Serviceman's Personal Property.—A commissioned officer in the United States Air Force stationed at an air field near Denver rented an apartment in that city. He assailed a Denver personal property tax on his household furnishings as violating the Soldiers and Sailors Relief Act, which provides that a member of the armed forces, for "purpose of taxation in respect of any person, or his property, income or gross income" by state or local governments, "shall not be deemed to have lost a residence or domicile" or to have acquired a residence or domicile in any state by reason of his absence or presence therein on military orders. The statute also provides that "personal property shall not be deemed to be located or present in or to have a situs for taxation in such state . . . or political subdivision." The Supreme Court set aside the tax holding that the levy violated the statute, which was within the federal constitutional power.⁴³ The most significant aspect of the case is the dissenting opinion of Mr. Justice Douglas, joined in by Mr. Justice Black, in which the surprising view is expressed that the statute exceeds the power of Congress in extending immunity from state taxation to the private affairs of a soldier. The dissent declares:

The private affairs of our military personnel—the disposition of their salary, the furniture they purchase, the apartments they rent, the

³⁹ 342 U.S. 232 (1952).

⁴⁰ General Electric Co. v. State, 256 P.2d 265 (Wash.), cert. granted, 74 Sup. Ct. 127 (1953).

⁴¹ Parker v. Limerick, Inc., 254 S.W.2d 454 (Ark.: 1953).

⁴² General Electric Co. v. State, 256 P.2d 265 (Wash.), cert. granted, 74 Sup. Ct. 127 (1953).

⁴³ Dameron v. Brodhead, 345 U.S. 322 (1953).

personal contracts that they make—by the very definition are not in the federal public domain. When Congress undertakes to protect them from state taxation or regulation, it is not acting to protect either a federal instrumentality or any function which a federal agency performs. Congress, therefore, acts without constitutional authority.⁴⁴

The majority opinion, written by Mr. Justice Reed, holds that the "necessary and proper" clause of the Federal Constitution authorizes Congress to provide the immunity from state taxation at issue in the exercise of the federal powers to declare war and raise and support armies. The Court points to the broad immunity from state taxation to private contractors upheld in the case of private contractors dealing with the Atomic Energy Commission and other agencies. While the Court has in recent years sharply limited the area of immunity from state taxation, and properly so in the silence of Congress, where Congress has acted an entirely different issue is presented. If our federal system is to be workable, the courts should be very slow to determine that there is no power in the Federal Government to restrict state taxation which may affect federal activities, even vis-a-vis taxes or in private affairs of the federal personnel.

Storage and Withdrawal Taxes as Applied to Federally Owned Gasoline.—Aviation gasoline owned by the United States was stored in tanks operated by a private oil company; the oil company was paid a service charge for storing, handling and loading the fuel. Tennessee imposed its storage and withdrawal tax at the rate of six cents a gallon on all the oil companies, which challenged the levy as violating federal tax immunity. The Supreme Court, with Chief Justice Vinson and Justices Black and Jackson dissenting, upheld the levy on the ground that it was not, as contended, a tax on federal property but instead an excise on the act of the private contractor in storing and withdrawing federal fuel and therefore not proscribed by the federal immunity doctrine.⁴⁵

⁴⁴ Id. at 239.

⁴⁵ *Esso Standard Oil Co. v. Evans*, 345 U.S. 495 (1953). There were a number of other federal immunity cases decided. In *Edwards House Co. v. Stone*, 216 Miss. 96, 61 So.2d 663 (1952) the operator of a hotel claimed exemption from a Mississippi 2 per cent tax—variously designated by the court as a "gross income" tax and a "sales" tax—for the receipts from a government contract under which it furnished lodgings for United States Army recruits. The statute exempted gross income derived from "sales of tangible personal property" or "charges for labor" to the United States Government. The court held that the hotel service fell in neither exempt category. It rejected the contention that the federal intergovernmental tax immunity invalidated the levy since the contractor had agreed to assume the burden of the state tax. In doing so, it relied on gross receipts tax cases levied on the vendor, whereas, as indicated above, the court at several points treats the levy as being a sales tax.

See also *Edward Hines Lumber Co. v. Lane County*, 248 P.2d 720 (Ore. 1952) under which logs cut by the taxpayer from land owned by the Federal Government but sold to the taxpayer under a conditional sales contract were held subject to property

VIII

TAX PROCEDURES AND MISCELLANEOUS TAXES

Suit in Foreign State to Collect Inheritance Tax Based on In Rem Proceeding.—In a pioneer decision handed down in 1946, a Missouri intermediate appellate court allowed a suit to recover income taxes brought by the State of Oklahoma, thereby departing from many holdings that the revenue laws of a state will not be enforced abroad.⁴⁶ Now, the same court has refused to apply its earlier decision so as to allow proceedings in Missouri to establish and collect a California inheritance tax.⁴⁷ The facts of the current case are these: In 1936 the decedent, while a resident of St. Louis, executed a revocable trust in which she named a St. Louis bank as trustee; in 1945 she died a resident and domiciliary of California. Her will was probated in California and her estate there administered by the public administrator, who applied assets located in California to pay federal estate taxes and partially to discharge California inheritance taxes. The Attorney General of that state, under appropriate California statute, now sues the St. Louis bank in Missouri in an attempt to recover the unpaid balance of the California tax. The local court held on the facts that the decedent was domiciled in California at her death and this conclusion is accepted by the higher court. The major ground on which the court refuses to allow the suit is that (a) this is admittedly not a suit based on a personal judgment in California which may invoke the full faith and credit clause and (b) unlike the earlier case, the only procedure prescribed by California law for determining the amount of its inheritance tax is a special procedure for which there is no counterpart in Missouri. Accordingly, the court concludes:

Thus we have a situation where a right [to levy an inheritance tax] is inextricably bound up with a prescribed statutory remedy available only in California. When a legislature so ties together a right and a remedy, it is impossible for courts of any other state to exercise jurisdiction.⁴⁸

This holding is an unhappy and unnecessary retrogression from the earlier decision, which had cut through archaic notions assimilating taxes to penal laws and refusing aid to sister states in their

tax despite the federal security title therein. Cf. *John McShain, Inc. v. Comptroller*, 95 A.2d 473 (Md. 1953) in which a contractor erecting buildings for use by a federal hospital was held exempt from state sales and use taxes on materials purchased for use in fulfilling the contract.

⁴⁶ *State ex rel. Oklahoma Tax Comm'n v. Rodgers*, 238 Mo. App. 1115, 193 S.W.2d 919 (1946).

⁴⁷ *California v. St. Louis Union Trust Co.*, 260 S.W.2d 821 (Mo. App. 1953).

⁴⁸ *Id.* at 830.

collection. The fact is that the estate had been given full and adequate notice of the California proceedings, which followed a widely used practice in handling inheritance tax assessments. There had been an appraisal of the estate by an inheritance tax appraiser, a judgment of the superior court in California approving the report and fixing tax liabilities, an accounting, petition and decree of discharge of the public administrator. These proceedings, although admittedly in rem and not in personam because of the nature of inheritance tax proceedings, established the tax liabilities of the estate and its legatees. Why then should these not have been accepted as establishing the California tax liability which required no further proceeding in Missouri other than the application thereto of Missouri assets? The court concedes that the St. Louis trust fund constituted assets from which the California tax is collectible and yet it denies the only available means of effecting collection. The court notes that the bank was not named as a party in the California proceeding; surely, this is not a sufficient basis for refusing to accept the California proceedings as establishing the state's claim to a tax out of assets from which admittedly the tax is collectible. If there was a failure to give the trustee or other parties adequate notice of the California proceedings—the opinion is vague on this point—that could be an objection to the acceptance by Missouri of the California proceedings, but lack of notice is not the ground of the court's decision. In short, this holding appears to be a backing away from the earlier decision, the effect of which will be to make difficult or impossible the collection of taxes properly payable. The decision is contrary to the current trend of legislative enactments designed to break down outmoded barriers to interstate enforcement of tax claims.⁴⁹

Validity of Unemployment Insurance Experience Credits where Required Notice to Employer Omitted.—A Texas case which the court found to be “saturated” with “the public interest” raised an important issue under the unemployment insurance laws. Under the Texas statute, like those of many other states, the effective employer tax rate varies with the employment experience of the particular employer—the lower the unemployment his employees experience and in turn the lower the amount of benefits required to be paid to his employees, the lower the employer's tax (within stated limits). This curious philosophy of rewarding the strong employer and penalizing the weaker economic unit apparently proceeds on the bizarre notion

⁴⁹ For a reference to other recent cases dealing with the problem and the legislation authorizing reciprocal out-of-state enforcement of tax claims see Hellerstein, *Cases and Materials on State and Local Taxation* 813 et seq. (1952).

that individual employers are at fault when business falls off and they lay off help. Where a person who receives unemployment insurance benefits worked for several employers during the benefit base period, all such employers are charged with the benefit payments for the purpose of calculating their experience ratings. Nevertheless, it was the practice of the Texas Employment Commission to notify only the applicant's last employer when application for insurance was filed, a practice which the Commission now concedes violated the notice provisions of the statute. All employers, it is conceded, should have notice and opportunity to object to the grant of the benefits. An employer sought a higher experience rating and hence a refund of taxes by the crediting to his record of all benefits granted to its former employees without notice to the employer. The trial court had granted the refund but the civil appeals tribunal reversed on the ground that the taxpayer had not established that any benefit had been improperly granted to any of its former employees and indeed the record indicated to the contrary that the taxpayer, having examined all the decisions, found them "regular on their face."⁵⁰ The

⁵⁰ Texas Employment Comm'n v. Todd Shipyards Corp., 257 S.W.2d 720 (Tex. Civ. App. 1953).

The Arkansas gross receipts tax statute contains a provision requiring all unpaid taxes to be paid prior to the sale of a business and imposes a lien therefor on the assets. The Commissioner of Revenue is forbidden to issue a permit to the purchaser to continue the business until all such taxes have been paid. The seller of a business made his final return on May 7, 1951, and paid the tax shown to be due; a permit to operate the business was granted to the buyer on May 24, 1951. On October 9, 1951, the state claimed a deficiency in the tax for the final period and sought to foreclose its alleged tax lien on the fixtures. The court denied the lien claim, apparently holding that the issuance of the permit on May 24, 1951, waived the lien. *Thompson v. Chadwick*, 225 S.W.2d 687 (Ark. 1953). A dissenting opinion holds that the Commissioner is not estopped by his issuance of the permit and that he is not authorized to waive the state's tax claims. Certainly this seems sound. Ordinarily the buyer is in a position to protect himself through his contract with the seller against such tax liability.

A 1950 amendment to the New York Tax Law provides for additional allowance to the taxpayer where the court finds that a real property tax assessment was increased without adequate cause. The court has refused to construe this provision as covering a mistake of judgment, holding that the statute requires arbitrary or intentionally harassing action before the additional award be made. *Beekman Family Ass'n v. Boyland*, 281 App. Div. 525, 120 N.Y.S.2d 742 (1st Dep't 1953).

In the miscellaneous tax area, educational building consultants were denied exemption from the New York State unincorporated business tax as not being persons practicing a profession. While some colleges offer courses on school planning, the court relied on the absence of a regular course of study leading to a degree in the field to justify its holding. *Application of Engelhardt*, 281 App. Div. 1053, 121 N.Y.S.2d 571 (3d Dep't 1953).

A taxpayer authorized "franchise dealers" to solicit orders for the sale of its windows and other products and contract installers to install the windows in buildings. Finding that the dealers were in effect sales agents compensated on a commission basis and that the installers performed services for wages, the taxpayer was held subject to

statute explicitly authorizes employers to apply to the Commission for adjustment in their experience rating. The decision is a practical one which denies a windfall to the taxpayer, which if granted might have resulted in wholesale refunds to other employers throughout the state because of a technical defect in procedure which in fact has not prejudiced any substantial right of the employer.

the Utah unemployment insurance tax on commissions and wages paid. *Leach v. Board of Review of Industrial Comm'n*, 260 P.2d 744 (Utah 1953).

In *Culbreath v. Reid*, 65 So.2d 556 (Fla. 1953) the court held that the Florida stamp tax on deeds does not apply to conveyance of property by way of gift.

The constitutionality of the City of Pittsburgh and Pittsburgh School District mercantile license taxes, measured by gross receipts, has been sustained against various attacks. The principal attacks have been on the ground that certain of the classifications and methods of calculations were discriminatory and arbitrary. *Goldstein v. School District of Pittsburgh*, 372 Pa. 188, 93 A.2d 243 (1953).

TRADE REGULATION

WALTER J. DERENBERG

AS THIS article is written, one year has passed since the advent of the new Republican administration. It was, of course, to be expected that in the area of business regulation, which involves so many basic issues of public policy, many far-reaching changes would occur and have, indeed, been announced and promised by the new administration. On the other hand, as this review will demonstrate, we are still on the threshold, at the time of this writing, of most of those basic reforms which the administration is planning to put into effect in the trade regulation field.

Much of the following presentation will deal, therefore, with a survey of some of the major programs which are in the process of formulation in connection with the proposed new antitrust policy, the administration of the new Federal Trade Commission's work, a proposed revision of the Robinson-Patman Act, and many other important policy issues. As in the past, this article will then proceed to discuss significant developments in the field of the private law of unfair competition and trade-mark protection.

I

RESALE PRICE MAINTENANCE

The Issue of "Fair Trade": The Constitutionality of the McGuire Act.—Resale price maintenance and fair trade laws have remained one of the focal points of controversy during 1953.¹ Since the enactment of the McGuire Act in July 1952,² the spotlight has, however, shifted from the legislature to the courts. The paramount issue yet to be decided was whether the United States Supreme Court would uphold the "nonsigner" clause as embodied in the McGuire Act against an attack of unconstitutionality which had been leveled against it in what has now become known as the "second" *Schweg-*

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¹ The literature on "fair trade" has been quite extensive: Hasson, *The Future of Resale Price Maintenance*, 41 Geo. L.J. 199 (1953); Schocken, *The McGuire Act: Shield or Weapon for Trade-Mark Owners?*, 41 Geo. L.J. 398 (1953); Sweeney, *Resale Price Maintenance and the Fair Trade Act of 1952*, 14 U. of Pitt. L. Rev. 102 (1952). Notes, *Fair-Trade Under State and Federal Law*, 2 Buff. L. Rev. 280 (1953); *Resale Price Maintenance and the McGuire Act*, 27 St. John's L. Rev. 379 (1953); *Price Maintenance as Affected by the Schwegmann Decision*, 6 Southwestern L.J. 117 (1952).

² 66 Stat. 631 (1952), 15 U.S.C.A. § 45 (Supp. 1953).

mann case.³ The new *Schwegmann* litigation,⁴ which resulted in a two-to-one decision upholding the McGuire Act and its enforceability with regard to nonsigners, was submitted to the United States Supreme Court on petition for certiorari. In its petition attacking the constitutionality of the McGuire Act, counsel for Schwegmann argued that the Act amounted to an unconstitutional delegation of a legislative function and resulted in a violation of the due process clause. The majority of the court of appeals, however, refused to consider these contentions, at least with regard to the constitutionality of the Act, since, in its opinion, that issue had been previously considered and rejected by the United States Supreme Court in its unanimous decision upholding the constitutionality of the Fair Trade Act of Illinois in the *Old Dearborn* case.⁵ It was pointed out that the first *Schwegmann* case involved no constitutional question but merely required an interpretation of the Miller-Tydings Act with respect to the enforceability of the state fair trade laws in interstate commerce. Having stated that, in its opinion, the *Old Dearborn* case was still the law unless overruled by the Supreme Court itself, the majority proceeded to reject the attack of unconstitutionality of the McGuire Act by stating:

Appellants' argument would render the statutes meaningless as to nonsigners. The intention of Congress and the intention of the Louisiana Legislature are clearly that restrictions on the non-signers, when imposed as the result of a contract between a producer and a distributor, are to be given effect. What is prohibited is horizontal price fixing agreements "between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other." The McGuire Act. We find nothing in the Louisiana

³ The first *Schwegmann* decision, *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951), held the provisions of the Louisiana fair trade statute inapplicable to nonsigners and is fully discussed in 1951 Annual Surv. Am. L. 365 et seq. and 1952 Annual Surv. Am. L. 281 et seq., 28 N.Y.U.L. Rev. 312 et seq. (1953).

⁴ *Schwegmann Bros. Giant Super Markets v. Eli Lilly & Co.*, 205 F.2d 788 (5th Cir.), cert. denied, 74 Sup. Ct. 71 (1953). The district court's opinion in favor of Eli Lilly & Co. is reported at 109 F.Supp. 269 (E.D. La. 1953). Fair traders were also greatly encouraged by a recent statement of FTC Chairman Howrey, in his speech before the National Association of Retail Druggists, October 1953, where he said: "The Commission should not seek to nullify the McGuire Act which has the strong support of small business, by the application of unrealistic legalisms or strained statutory interpretation. This Act, as you know, exempts from the operation of the Federal antitrust laws vertical resale price maintenance contracts which are legal under state fair trade acts. At the time the McGuire Act was introduced the Commission deemed the bill not to be in the public interest and urged Congress to reject it. The Act is now on the books; and Congress, by an overwhelming vote, has left no doubt concerning the basic purpose and intent of the legislation."

⁵ *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U.S. 183 (1936).

Fair Trade Law or in the McGuire Act self-defeating or violative of the Constitution of the United States.⁶

Judge Holmes, in a lengthy dissenting opinion, challenged the basic philosophy underlying the Supreme Court's decision in the *Old Dearborn* case. The Louisiana statute was branded by Judge Holmes as "coercive" and as "lacking in due process, confiscatory, and void." Judge Holmes concluded:

Being entirely coercive as to the appellants, the judgment appealed from should be reversed; otherwise the original Sherman Act may be whittled away by legislative exemptions and exceptions, administrative orders and processes, trade-mark devices, patent rights, judicial decisions, and consensual price-fixing under brigaded state and federal legislation.⁷

As the result, the McGuire Act was held constitutional in the second *Schwegmann* case.⁸ On October 19, 1953, the Supreme Court denied certiorari. This denial will undoubtedly be considered a milestone in the fair trade movement and in effect reaffirms the philosophy of the *Old Dearborn* case and indirectly establishes the constitutionality of the McGuire Act. Moreover, several high state courts have expressly upheld the validity of the McGuire Act and have consequently enforced the nonsigner provisions of the various state fair trade laws even with regard to interstate transactions.⁹ Outstanding among these

⁶ 205 F.2d 788, 793 (5th Cir.), cert. denied, 74 Sup. Ct. 71 (1953).

⁷ Id. at 798.

⁸ 205 F.2d 788 (5th Cir.), cert. denied, 74 Sup. Ct. 71 (1953). The only severe setback suffered by fair traders occurred in Georgia, when the supreme court of that state held the Georgia Fair Trade Act to be unconstitutional as being in violation of the "due process" clause of the state's constitution. *Grayson-Robinson Stores, Inc. v. Oneida, Ltd.*, 209 Ga. 613, 75 S.E.2d 161 (1953), 31 N.C.L. Rev. 509. The United States Supreme Court denied certiorari. 74 Sup. Ct. 39 (1953). While agreeing with the plaintiff's contention that the provisions of the state Fair Trade Act are no longer in conflict with the Sherman Act, as amended by the McGuire Act, the Georgia Supreme Court ruled that the state's Fair Trade Act could not become valid "without re-enactment after the Sherman Act was amended." The Act was held to have been contrary to and inconsistent with the Sherman Act before the latter was amended by the McGuire Act, and could be validated, therefore, only by re-enactment. Several years before the enactment of the McGuire Act the Florida Supreme Court had invalidated that state's fair trade statute in *Liquor Store, Inc. v. Continental Distilling Corp.*, 40 So.2d 371 (1949), and the Michigan Supreme Court had held the Michigan state act unconstitutional in *Shakespeare Co. v. Lippman's Tool Shop Sporting Goods Co.*, 334 Mich. 109, 54 N.W.2d 268 (1952), 16 Detroit L.J. 57.

⁹ A significant victory for fair trade was secured by the Sunbeam Corporation in *Sunbeam Corp. v. Payless Drug Stores*, 113 F.Supp. 31 (N.D. Cal. 1953). It was there held that nonsigning retailers should be enjoined for tortious interference with those wholesalers who had validly agreed with plaintiff to prescribe resale prices in their agreements with retailers. The validity of Sunbeam's contract with the wholesalers was upheld and a broad injunction issued against the defendants. The McGuire Act was referred to as removing all doubt about the legality of the plaintiff's fair trade contracts. Defendants were enjoined from inducing or attempting to induce any person

is the decision by the Supreme Court of California in the recent case of *Cal-Dak Co. v. Sav-On Drugs, Inc.*¹⁰ In that case, the state supreme court, sitting in bank, held that the McGuire Act in effect "nullifies" the Supreme Court's decision in the first *Schwegmann* case.¹¹ As a result, the lower court was directed to grant injunctive relief and consider the question of damages further "in the light of the 1952 change in the law." No doubt whatsoever was cast by the court upon the constitutionality of the McGuire Act. An Oregon court held, in *Federal Cartridge Corp. v. Henning Helstrom*,¹² that the McGuire Act was not retroactive but, in passing, expressed some doubt with regard to its constitutionality although accepting it "at its face value as a fully constitutional piece of legislation." In Illinois, Judge Desort ruled that the McGuire Act was constitutional and gave effective relief to Sunbeam Corporation on the ground that the fair trade price schedule involved was based on contracts executed *subsequent* to the enactment of the Act.¹³ Not as clear is the position of the Supreme Court of New Jersey. When the nonsigner clause of the New Jersey Fair Trade Act was argued before that court late in 1952 in a series of cases,¹⁴ the court denied relief against nonsigners on the basis of the first *Schwegmann* decision, but expressly noted:

who was a party to such a contract from breaching it as well as from selling or offering for sale Sunbeam products at less than the fair trade prices.

¹⁰ 40 Cal.2d 492, 254 P.2d 497 (1953). In Minnesota the Attorney General in an official opinion ruled that the nonsigner provision under the Minnesota statute was valid as a result of the McGuire Act of 1952. "The effect of the act of July 14, 1952, is to change the rule in the Schwegmann case and the Calvert case to the end that M.S.A. 325.12 is now effective." 1952 CCH Trade Cases ¶ 67,391. In Utah the Attorney General ruled that the McGuire Act authorized the state to enforce minimum resale price contracts against any violator thereof operating within the state, whether the sales be in interstate commerce or not. 1953 CCH Trade Cases ¶ 67,446. In the State of Washington Judge Seering of the superior court held in *Elgin Nat. Watch Co. v. Harry Druxman*, 1953 CCH Trade Cases ¶ 67,498, that the constitutionality of the Washington Fair Trade Act should be sustained, and that the above-mentioned decision of the Georgia Supreme Court in *Grayson-Robinson Stores v. Oneida, Ltd.*, 209 Ga. 613, 75 S.E.2d 161 (1953), was against the weight of authority. Of even more significance was the decision of Judge Holt of the Florida circuit court upholding the constitutionality of the re-enacted Florida Fair Trade Act of 1949 (the Florida Act having been declared unconstitutional by the Florida Supreme Court in *Liquor Store, Inc. v. Continental Distilling Corp.*, 40 So.2d 371 [1949]) and his observation that the new Act was valid both with regard to intrastate and interstate sales. *Sunbeam Corporation v. Chase & Sherman, Inc.*, 1953 CCH Trade Cases ¶ 67,524. Contra: *Miles Laboratories, Inc. v. Eckerd*, 1953 CCH Trade Cases ¶ 67,533.

¹¹ See note 3 *supra*.

¹² 1952 CCH Trade Cases ¶ 67,366.

¹³ *Sunbeam Corp. v. Central Housekeeping Mart, Inc.*, 1952 CCH Trade Cases ¶ 67,379.

¹⁴ *Johnson & Johnson v. Charmley Drug Co.*, 11 N.J. 526, 95 A.2d 391 (1953); *Johnson & Johnson v. Weissbard*, 11 N.J. 522, 95 A.2d 403 (1953); *Hoffman-La Roche, Inc. v. Weissbard*, 11 N.J. 541, 95 A.2d 398 (1953).

We are not called upon to assess plaintiffs' rights under the McGuire Act adopted by the Congress July 14, 1952, after this appeal was taken. . . . The statute is not invoked here.¹⁵

In *Johnson & Johnson v. Charmley Drug Co.*¹⁶ the New Jersey Supreme Court observed that the McGuire Act, "although seeming to immunize also the nonsigner provisions of state acts," was not retroactive in its operation, and in the *Hoffman-La Roche* case,¹⁷ decided on the same day, the court, in refusing to give retroactive effect to the McGuire Act, said:

. . . and it would be contrary to simple justice and sound orthodox practice now, in this very proceeding, to enjoin the repetition of acts lawful when done but rendered unlawful thereafter by a legislative act supervening the judgment properly dismissing the complaint for want of a cause of action.¹⁸

In New York, the Appellate Division handed down a significant decision in the case of *General Electric Company v. Masters, Inc.*,¹⁹ one of the large discount houses in the area, upholding the lower court,²⁰ which had granted an injunction against price cutting by a nonsigner despite defendant's attacks upon the constitutionality of the New York Fair Trade Act and the McGuire Act. General Electric was equally successful in getting injunctive relief in its proceeding against S. Klein-on-the-Square, Inc.²¹ Judge Walter, in a comprehensive opinion, gave full force and effect to the nonsigner clause and said with regard to the alleged unconstitutionality of the McGuire Act:

As I see it, the question posed by that argument is: "May Congress regulate interstate commerce by allowing state laws to regulate it?";

¹⁵ 11 N.J. 552, 558, 95 A.2d 403, 406 (1953).

¹⁶ 11 N.J. 526, 540, 95 A.2d 391, 398 (1953).

¹⁷ *Hoffman-La Roche, Inc. v. Weissbard*, 11 N.J. 541, 95 A.2d 398 (1953).

¹⁸ *Id.* at 551, 95 A.2d at 403. The McGuire Act was not enforced in a decision by Judge Freund of the New Jersey Superior Court in *Lionel Corp. v. Grayson-Robinson Stores, Inc.*, 98 A.2d 623 (Ch. Div. 1953). He said: "I am led to the conclusion that a court of equity may not issue an injunction to compel a non-contracting, non-assenting retailer to adhere to a price-fixing schedule established by a manufacturer or producer of a commodity not affected by a public interest, and that to that extent the McGuire Act is ineffective."

¹⁹ 281 App. Div. 827, 118 N.Y.S.2d 927 (1st Dep't 1953).

²⁰ 128 N.Y.L.J. 1475, col. 6 (Sup. Ct. Dec. 12, 1952), 1952 CCH Trade Cases ¶ 67,382. On the other hand, a motion to dismiss in the case of *Masters, Inc. v. Sunbeam Corp.*, 112 F.Supp. 268 (S.D.N.Y. 1952), in which Masters sought treble damages and an injunction against enforcement of Sunbeam's universal fair-trade contract system, was denied on the ground that the particular system employed did not come within the scope of the McGuire Act but fell within the condemnation of the first Schwegmann case. See note 3 *supra*.

²¹ 121 N.Y.S.2d 37 (Sup. Ct. 1953). To the same effect see *Lionel Corp. v. S. Klein, Inc.*, 129 N.Y.L.J. 1590, col. 2 (May 12, 1953), 1953 CCH Trade Cases ¶ 67,487 (Sup. Ct. 1953).

and it seems to me that that is precisely what Congress has been doing, to a very large extent, ever since the formation of our government.²²

The Closing of the "Wentling Loophole."—In last year's Survey,²³ hope was expressed that the question whether Section 5(a)(4) of the McGuire Act effectively closed the so-called Wentling loophole would be judicially determined during 1953.²⁴ It will be recalled that under the *Wentling* decision, mail-order houses and similar operators were permitted to bypass the fair trade laws of their own states by making interstate shipments across state lines. At least two lower courts, one federal district court and one New York State court, have now held that the McGuire Act was intended to close the loophole and that nonsigners who sell across state lines will be held liable under the applicable fair trade law. Judge Chesnut, in *Sunbeam Corp. v. MacMillan*,²⁵ after a full discussion of the history of the McGuire Act, ruled that Section 5 of the latter Act was passed for the express purpose of overcoming the effect of the *Wentling* decision. Judge Chesnut said:

In writing the Miller-Tydings and the McGuire Acts Congress had in mind the boundaries between Federal and State power. As to the Anti-trust Acts Congress had full constitutional power under the Interstate Commerce clause; but as to activities within the State the Federal power extended only to such activities as directly and appreciably affected interstate commerce. The plainly expressed purpose and policy of Congress in writing the two Acts was to remove the ban of anti-trust laws from interstate re-sale price maintenance policies conducted within the limitations of the Acts. But Congress had no power to validate such price maintenance if the law of a particular State was to the contrary. And as the fair trade laws of the States were not entirely uniform and as a few of the States did not have any fair trade law, it was necessary in the Acts to recognize that State policy might be opposed to price maintenance. To construe these Acts of Congress to prohibit re-sales interstate as restraints on interstate commerce seems to me to be quite inadmissible. In effect it would probably quite destroy re-sale maintenance although quite in accord with a particular State policy. And the injunction sought in this case is not against re-sale interstate by the defendant but against any sales below the stipulated minimum price.²⁶

Ample support for this position was found in the House Report on the McGuire Act (from which Judge Chesnut liberally quotes).²⁷

²² 121 N.Y.S.2d 37, 52 (Sup. Ct. 1953).

²³ 1952 Annual Surv. Am. L. 283 et seq., 28 N.Y.U.L. Rev. 314 et seq. (1953).

²⁴ The "Wentling loophole" was created by the decision in *Sunbeam Corp. v. Wentling*, 185 F.2d 903 (3d Cir. 1950). See 1952 Annual Surv. Am. L. 283, 28 N.Y.U.L. Rev. 314 (1953); 1951 Annual Surv. Am. L. 368; 1950 Annual Surv. Am. L. 306.

²⁵ 110 F. Supp. 836 (D. Md. 1953).

²⁶ Id. at 843.

²⁷ H.R. Rep. No. 1437, 82d Cong., 2d Sess. (1952).

It is interesting to note that the judge gave retroactive effect to this provision of the Act. Judge Wasservogel, of the New York Supreme Court, in *Raxor Corp. v. Goody*,²⁸ came to the same conclusion.

The Present Position of "Manufacturing-Retailers": The Legal Effect of Their Dual Capacity.—Shortly after the enactment of the McGuire Act, the Antitrust Division of the Department of Justice filed its complaint against McKesson & Robbins,²⁹ charging the latter with violation of the antitrust laws as a result of its fair trade agreements with wholesale druggists. As stated in last year's *Survey*,³⁰ it was the Government's position that McKesson & Robbins, being a manufacturer and the country's largest wholesale druggist at the same time, could not validly enter into "horizontal" price-fixing agreements with competing wholesalers. While this case is still pending, the FTC has brought a similar proceeding against the Eastman Kodak Company³¹ and, more recently, against Doubleday & Company,³² one of the country's largest book publishers, alleging that Doubleday, being engaged not only in the publishing business but also in the retail book trade, could not validly fix the resale price of books sold to the public through independent retail book stores in competition with its own retail outlets. The question soon arose whether Doubleday's practices were within the immunity accorded by the McGuire Act or whether they came within the exception which had already been previously incorporated in the Miller-Tydings Act—exempting from the applicability of the Act price-maintenance contracts "between manufacturers . . . or between retailers, or between persons, firms, or corporations in competition with each other." This was one of the first major issues to come before the "new" FTC, whose members apparently widely differ with regard to the answer to this important question. None of the Commissioners quite agreed with the dismissal of the complaint against Doubleday on the ground that the exception did not apply to a manufacturer whose retailing operation was only "incidental to a different major endeavor." Chairman Howrey, also speaking for Commissioner Mead, took the position, in one of his first reported decisions, that the hearing examiner had not reached the ultimate question for decision, *i.e.*, the question whether Doubleday's agreements were vertical or horizontal. He said:

The fact that respondent functions in a dual capacity—as a publisher and as a retailer—is not determinative of the issue. The practice

²⁸ 121 N.Y.S.2d 882 (Sup. Ct. 1953).

²⁹ *United States v. McKesson & Robbins, Inc.*, Civil No. 76-50, S.D.N.Y., May 27, 1952.

³⁰ 1952 Annual Surv. Am L. 284, 28 N.Y.U.L. Rev. 315 (1953).

³¹ FTC Docket No. 6040 (1953), 3 CCH Trade Reg. Rep. ¶ 11,197 (1953).

³² FTC Docket No. 5897 (1953), 3 CCH Trade Reg. Rep. ¶ 11,515 (1953).

of manufacturers of selling their products direct to consumers through their own outlets, while at the same time selling to independent wholesalers and retailers is a widespread marketing practice.

* * *

It is common knowledge that many manufacturers engaged to a lesser or greater degree in some wholesaling or retailing activity. Consequently the effect would be to nullify the newly passed McGuire Act insofar as large segments of our economy are concerned. Such a disregard of Congressional intent is neither logical nor necessary. It does violence to the fundamental principle that legislation should be construed in the light of its basic purpose.

In this connection we cannot close our eyes to the long and controversial history, both legislative and litigious, of resale price maintenance. Certainly Congress, in enacting the McGuire Bill by an overwhelming vote, left us in no doubt concerning the basic purpose and intent of the legislation. It approved resale price maintenance and it is not the Commission's business to nullify that approval.⁸³

While thus remanding the case to the hearing examiner, it seems an almost foregone conclusion that at least Commissioners Howrey and Mead would ultimately decide in favor of the publisher. Commissioner Spingarn's opinion on the other hand, would seem to invite the opposite conclusion. Said he:

I believe that the present record contains a prima facie case upon which, if no further evidence were presented, the Commission could issue an order prohibiting respondent from entering into agreements with retailers of books which agreements would fix the resale prices of books sold by retail stores in competition with respondent's retail stores.⁸⁴

Commissioner Carretta, too, expressed the view that the Commission had at least proven a prima facie case which had to be rebutted by the publishing house. It now remains to be seen what ultimate disposition will be made of this important issue.⁸⁵

⁸³ Ibid. See also FTC Press Release 2 (Sept. 25, 1953).

⁸⁴ 3 CCH Trade Reg. Rep. ¶ 11,515 (1953).

⁸⁵ The Commission had also charged Doubleday with antitrust violation and with exceeding its copyright monopoly by giving book clubs exclusive publishing rights and by agreeing not to publish or release to retail booksellers those copyrighted publishers' editions in which a publishing license was granted to book clubs. The Commissioners held this practice to be within the exclusive rights conferred by the Copyright Act of 1909 upon the author or proprietor of the copyright in a book. After its ruling in the Doubleday case, the Commission also sent the Eastman Kodak Company case back to the hearing examiner for further proceedings. However, as Commissioner Mead did not participate in the Eastman case, the case was remanded by a three-to-one vote. Chairman Howrey strongly dissented from the majority decision which held that the FTC had presented a prima facie case. The ruling was issued on the last day of Commissioner Spingarn's term, so that the decision of this issue of the Doubleday and Eastman cases will ultimately depend upon the vote of the new Commissioner, former Congressman Gwynne. Chairman Howrey referred to the Eastman complaint as representing "another of those peripheral 'test' cases of strained statutory interpretation, doubtful validity, and unfortunate economic consequence." 3 CCH Trade Reg. Rep. ¶ 11,527 (1953).

Mandatory Liquor Price Fixing: Connecticut Act Upheld.—The Connecticut Supreme Court of Errors recently upheld Section 4306 of the Connecticut General Statutes,³⁶ which provides that each manufacturer, wholesaler and out-of-state shipper of liquor shall post with the Liquor Control Commission the price of any brand of goods offered for sale in Connecticut and that the prices as posted shall become mandatory resale prices within the state. Against an attack on the constitutionality of this section as being violative of the commerce clause of the Constitution, the Connecticut Supreme Court affirmed its position previously taken in the case of *Schwartz v. Kelly*,³⁷ to the effect that under the Twenty-First Amendment, the State of Connecticut had the power to enact this type of legislation unrestricted by the commerce clause of the Federal Constitution.

II

THE FEDERAL TRADE COMMISSION

The "New" Commission and Its Proposed General Program and Policy.—In what now appears to be the "swan song" of the old Commission,³⁸ an unusual plea was made for a larger appropriation in the light of the ever-increasing new statutory responsibilities of the Commission. In a chapter entitled *A Vital Commission Problem*, the most recent annual report of the Commission states:

Thus the Commission resembles a city which, while doubling in population and tripling its volume of trade, has slightly reduced the size of its police and fire department. Maintenance of effective operations has become steadily more difficult.³⁹

Despite this rather gloomy observation and the new administration's determined efforts to reduce, rather than enlarge, the operating budget of the various government agencies, the new Chairman of the Commission, Honorable Edward F. Howrey, in one of his first published addresses, has charted a new course for the Commission which, when carried out, may result in fundamental changes both in its administrative structure and in its general enforcement policy. In his address before the 1953 Institute on the Federal Antitrust Laws at the University of Michigan Law School,⁴⁰ Chairman Howrey proposed a re-evaluation of the Commission's responsibilities in numerous respects of which a few of the more far-reaching ones may be briefly summarized here:

³⁶ *Beckanstin v. Liquor Control Comm'n*, 1953 CCH Trade Cases ¶ 67,572.

³⁷ 1953 CCH Trade Cases ¶ 67,559.

³⁸ FTC Annual Report for the fiscal year ended June 30, 1952.

³⁹ *Id.* at 10.

⁴⁰ The entire address is reprinted in *Proc. Am. Bar Ass'n, Section of Antitrust Law*, Aug. 26-27, 1953, at 29.

(1) For the first time it is planned to establish a Bureau of Consultation within the Commission. The purpose of the Bureau would be to co-operate and consult with business, to give informal advice on matters involving the Commission's work and to seek voluntary compliance with the laws administered by the Commission through conferences and other informal procedures. It is planned to have a special division within the Bureau devoted to small business problems. The Conference Division within the Bureau will give potential respondents an opportunity to appear voluntarily and show cause why a complaint should not issue against them. It is thought that as a result of such joint conferences, the issuance of many formal complaints may be avoided.

(2) In the Chairman's opinion, any application of a rigid "per se" violation test with regard to any one of the antitrust statutes often makes impossible the finding of an adequate solution of intricate economic problems which are submitted to the "body of experts" which Congress intended the Commission to be. Mr. Howrey suggests, therefore, that such "per se" interpretations without regard to business economics and public policy are not in accord with the basic philosophy which led to the creation of the Commission and the more flexible enforcement policies should be adopted.

(3) The lack of guiding yardsticks appears particularly noticeable in connection with the administration of the Robinson-Patman Act. "For my own part," said Chairman Howrey, "I believe in its philosophy and am obligated to enforce it." But "I . . . intend to recommend the establishment of an advisory committee on cost justification consisting of accountants, economists and lawyers representing all viewpoints."⁴¹

(4) While not specifically mentioned in his Michigan address, Chairman Howrey is on record as being in favor of avoiding any conflict or duplication of effort between the FTC and the Antitrust Division of the Department of Justice or any similar conflict between the Commission and the Food and Drug Administration.

(5) To avoid unnecessary delay in the disposition of cases, it is planned to have a management survey made by an outside firm of management engineers in order to make recommendations for the elimination of excess paper work, for the simplification of the Commission's staff, and other administrative problems.⁴²

⁴¹ Id. at 34-35.

⁴² Commissioner Carretta, in an address before the Proprietary Ass'n, June 9, 1953, at White Sulphur Springs, W. Va., (FTC Press Release, June 15-22, 1953) had already expressed views similar to those of the new Chairman with regard to the role of the Commission as a "friendly policeman of business."

A few weeks after his Michigan address, Chairman Howrey, in a paper entitled "Compliance with Commission Orders,"⁴³ stated that some of the above-mentioned recommendations had already been put into effect and that "a substantial beginning" had been made to reorganize the Commission's operations.

*Antideceptive Practices Bureau.*⁴⁴ *Use of the Word "Free."*—One of the first decided changes in policy which has resulted from the reconstituted Commission under the new administration is its recent reversal of the strict interpretation with regard to the use of "free" offers in the book trade and other industries. As stated in last year's report,⁴⁵ the Commission had outlawed by a three-to-one vote the use of the word "free" in connection with book dividends by The Book-of-the-Month Club as "false, misleading and deceptive." In February 1953, the Court of Appeals for the Second Circuit, in an opinion by Judge Frank,⁴⁶ reluctantly sustained the Commission's order in the *Book-of-the-Month Club* case,⁴⁷ feeling bound to do so as the result of the United States Supreme Court's decision in the *Standard Education* case,⁴⁸ in which the Court had reversed the more realistic and liberal approach which the court of appeals had advocated in the *Standard* case. The view of the court of appeals that "too solicitous a censorship is worse than any evils it may correct,"⁴⁹ has now found belated recognition by the new Commission in its recently announced change of policy with regard to the use of the word "free." The majority of the Commissioners, in ordering dismissal of the complaint against Walter J. Black, Inc.,⁵⁰ in which The Book-of-the-Month Club had appeared as amicus curiae, ruled that goods given without cost upon the purchase of other merchandise may be described as "free" as long as the term was used honestly and not "as a device for deceiving the public." According to Commissioner Carretta's opinion, use

⁴³ Address of FTC Chairman Howrey before the American Institute of Wholesale Plumbing and Heating Supply Associations, Sept. 21, 1953.

⁴⁴ Attention may be called to the recently published book by Max A. Geller, *Advertising at the Crossroads* (1952). The work is reviewed in 62 Yale L.J. 141 (1952). Mr. Geller, as president of a large advertising agency, discusses the work of the FTC from the point of view of the advertising executive rather than from the legal point of view. See also the comprehensive and valuable Note, *Trade Rules and Trade Conferences: The FTC and Business Attack Deceptive Practices, Unfair Competition, and Antitrust Violations*, 62 Yale L.J. 912 (1953).

⁴⁵ 1952 Annual Surv. Am. L. 293, 28 N.Y.U.L. Rev. 324 (1953).

⁴⁶ *Book-of-the-Month Club, Inc. v. FTC*, 202 F.2d 486 (2d Cir. 1953).

⁴⁷ *Book-of-the-Month Club, Inc.*, FTC Docket No. 5572 (1952). For a digest of this case see 38 A.B.A.J. 677 (1952).

⁴⁸ *FTC v. Standard Education Soc'y*, 302 U.S. 112 (1937), reversing in part 86 F.2d 692 (2d Cir. 1936).

⁴⁹ 86 F.2d 692, 695 (2d Cir. 1936).

⁵⁰ FTC Docket No. 5571, 3 CCH Trade Reg. Rep. ¶ 11,510 (1953).

of the term "free" will be considered unfair and deceptive only under the following circumstances:

(1) When all of the conditions, obligations, or other prerequisites to the receipt and retention of the "free" article of merchandise are not clearly and conspicuously explained or set forth at the outset so as to leave no reasonable probability that the terms of the advertisement or offer might be misunderstood; or

(2) When, with respect to the article of merchandise required to be purchased in order to obtain the "free" article, the offerer either (1) increases the ordinary and usual price; or (2) reduces the quality; or (3) reduces the quantity or size of such articles of merchandise.⁵¹

No longer will the use of the word "free" be prohibited—as had been the Commission's policy until now—whenever any strings whatever are attached to the word.⁵²

Jurisdictional and Procedural Problems: (a) Bills of Particulars.—During the almost forty years of operation of the Commission, the important procedural question whether a respondent may file a motion for a bill of particulars in respect to the allegations of the Commission's complaint was never determined until the full Commission passed upon this issue early this year in a series of cases involving alleged violations of the Robinson-Patman Act.⁵³ In a three-to-two decision, Commissioners Mead, Carson and Spingarn held that the motion for a bill of particulars should be denied. The majority held that the informal discussion which usually precedes the issuance of a formal complaint sufficiently apprises prospective respondents of the nature of the charges which may later be filed against them. Said Commissioner Spingarn, speaking for the majority:

I believe most strongly in due process, as should any lawyer worth his salt. However, I think that it is generally conceded that the administrative process is designed to cut away some of the cumbersome procedure and legal strictness which necessarily characterizes trial court procedure. As compensation for relaxation of the ordinary legal process, administrative process affords to the adversary party other advantages such as judicial review and enforcement of administrative orders. One need only contrast the differences between Federal Trade Commission and District Court trials to calculate the advantages accruing to a respondent in an administrative trial.⁵⁴

⁵¹ Id. at ¶ 11,510, p. 12,486.

⁵² As a result the Commission has expressly rescinded its administrative interpretation in respect to the use of the word "free," as published in 16 Code Fed. Reg. § 4.1 (1949).

⁵³ In the Matter of Fruitvale Canning Company, In the Matter of Safeway Stores, In the Matter of The Kroger Co., FTC Docket Nos. 5989, 5990, 5991, 3 CCH Trade Reg. Rep. ¶ 11,334 (1953).

⁵⁴ Commissioner Spingarn's Opinion, id. at ¶ 11,334, p. 12,401.

(b) *Injunctive Proceedings under Section 13 of the Federal Trade Commission Act.*—In one of its recent efforts to make more effective use of its authority to seek injunctive relief in cases involving false advertising of food, drug and cosmetic products under Section 13 of its organic act, the Commission had sought an injunction against the makers of "Chesterfield" cigarettes, basing its action on the theory that tobacco was a "drug" under Section 13 of the Act.⁵⁵ As reported last year,⁵⁶ the district court refused to accept this argument and its decision⁵⁷ was recently affirmed without opinion by a unanimous court of appeals.⁵⁸

Under Section 13, the Commission may seek an injunction "pending the issuance of a complaint." Several years ago the question arose in the seventh circuit whether, under this wording, the Commission could still apply for an injunction *after* its administrative complaint had been filed. The question was answered in the affirmative.⁵⁹ More recently, an injunction likewise issued in the "Imdrin" case,⁶⁰ in which the request for an injunction had also been filed long after the issuance of the Commission's complaint; the court of appeals held, in overruling the lower court, that an injunction should issue without even discussing the propriety of such procedure under the wording of Section 13. The issue was raised for the third time in the recent case of *FTC v. National Health Aids, Inc.*⁶¹ where the motion for an injunction was filed contemporaneously with the Commission's formal complaint. Judge Chesnut followed these precedents, although in his judgment the question of construction was not free from doubt. Said he:

I think it was within the intention of Congress that the Commission should have that authority to proceed, and it is not difficult to contemplate possible cases where the public interest would require such procedure either before or after the issuance of the administrative complaint.⁶²

(c) *Effect of Discontinuance of Accused Practice.*—It appears well settled today that discontinuance of an objectionable practice does not normally prevent the issuance of a cease and desist order

⁵⁵ *FTC v. Liggett & Myers Tobacco Co.*, 108 F. Supp. 573 (S.D.N.Y. 1952).

⁵⁶ 1952 Annual Surv. Am. L. 294, 28 N.Y.U.L. Rev. 325 (1953).

⁵⁷ *FTC v. Liggett & Myers Tobacco Co.*, 108 F. Supp. 573 (S.D.N.Y. 1952). See Note, 21 Geo. Wash. L. Rev. 651 (1953).

⁵⁸ *FTC v. Liggett & Myers Tobacco Co.*, 203 F.2d 955 (2d Cir. 1953), 1953 CCH Trade Cases ¶ 67,486.

⁵⁹ *FTC v. Thomsen-King & Co.*, 109 F.2d 516 (7th Cir. 1940).

⁶⁰ *FTC v. Rhodes Pharmacal Co.*, 191 F.2d 516 (7th Cir. 1951). See 1951 Annual Surv. Am. L. 372.

⁶¹ *FTC v. National Health Aids, Inc.*, 108 F. Supp. 340 (D. Md. 1952).

⁶² *Id.* at 345.

unless the cessation is permanent, complete and in good faith. In this regard, the federal courts will not substitute their own judgment for the Commission's discretion unless it appears, as the Court of Appeals for the Second Circuit recently put it, that the practice has been "surely stopped."⁶³ Nor will members of a board of directors escape individual responsibility on the ground that they were acting only on behalf of the corporation or had recently resigned as officers thereof. Where it appears that such respondents participated in the use of unfair or deceptive practices, the Commission's order against them individually will be enforced regardless of whether they may have, in the meantime, resigned from the board of directors.⁶⁴ The individual respondent's argument that they could not be held responsible for misrepresentations made by their salesmen as independent contractors was likewise rejected both by the Commission and the court, upon a finding that the respondents had actively encouraged the salesmen to make the false representations and had furnished them with the means thereof.

(d) *The Requirement of Fair Hearing: The Carter Liver Pills Case.*⁶⁵—The procedure adopted by the hearing examiner in the much-discussed case of *Carter Products, Inc. v. FTC* was subjected to severe criticism in the unanimous opinion of the Court of Appeals for the Ninth Circuit,⁶⁶ which set aside the Commission's order on the ground of lack of fair hearing. It was held that the trial examiner had unduly curtailed the respondent's right to cross-examination of a witness whom the Commission itself had used as an expert:

Now clearly it is not permissible for the Commission to qualify and use a witness for its own purposes as one having attainments in the field of gastroenterology, and then reduce him for purposes of cross-examination to the stature of a mere taker and explainer of X-ray pictures.⁶⁷

In the court's opinion, this and other unjustifiable curtailments of the right to cross-examine the Commission's key witness resulted in depriving the respondent of a fair hearing. However, the United States Supreme Court,⁶⁸ in its first session on October 12, 1953, ruled that the court of appeals should not have set aside the FTC's order in its entirety but should remand the case to the Commission for further proceedings in accord with accepted principles of fair hearing.

⁶³ *Dejay Stores, Inc. v. FTC*, 200 F.2d 865 (2d Cir. 1952), citing *Eugene Dietzgen Co. v. FTC*, 142 F.2d 321, 331 (7th Cir. 1944).

⁶⁴ *Consumers Sales Corp. v. FTC*, 198 F.2d 404 (2d Cir. 1952).

⁶⁵ *FTC v. Carter Products, Inc.*, FTC Docket No. 4970, March 28, 1951. See 1951 Annual Surv. Am. L. 374.

⁶⁶ *Carter Products, Inc. v. FTC*, 201 F.2d 446 (9th Cir. 1953).

⁶⁷ *Id.* at 454.

⁶⁸ *FTC v. Carter Products, Inc.*, 74 Sup. Ct. 2 (1953).

III

THE ROBINSON-PATMAN ACT⁶⁹

Maximum Quantity Discounts in the Tire and Rubber Industry.—It was reported last year⁷⁰ that the Commission for the first time in its history promulgated maximum quantity discount rules under Section 2(a) of the Robinson-Patman Act for replacement tires and tubes over Commissioner Mason's dissent, and that Judge McGuire of the district court dismissed a series of complaints brought against the Commission and each of the Commissioners by all the major manufacturers of rubber tires in this country. Under the quantity limitations set by the Commission's order, a carload quantity was to be the maximum quantity which could be lawfully used to justify price differentials. The Court of Appeals for the District of Columbia unanimously reversed the district court last summer and remanded the case for further proceedings.⁷¹ It held, in other words, that the civil action brought against the Commission seeking enjoinder of the enforcement of its quantity-limit rules, did state a cause of action as well as a justiciable controversy under the Declaratory Judgment Act. Two methods of selling were the subject matter of the Commission's order and the court's decision. Under the first of these, the so-called "dealer" system, the manufacturer's goods are sold to distributors or dealers who, in turn, resell them to consumers. Under the other system, discounts are offered under the so-called "private brand" arrangement, which contemplates the sale of merchandise bearing the purchaser's rather than the manufacturer's brand name. The plaintiffs in the now pending action argued that the Commission's quantity-limit order seriously interfered with, if not destroyed, both of these price structures. Without deciding the question of the validity of the Commission's order on the merits, the court of appeals ruled that the plaintiffs had stated a cause of action under the rule of *Columbia Broadcasting System v. United States*,⁷² where it had been alleged that an order of the Federal

⁶⁹ Recent additions to the literature on this subject include: Kelley, *Functional Discounts Under the Robinson-Patman Act*, 40 *Calif. L. Rev.* 526 (1952); Morton & Cotton, *Robinson-Patman Act—Anti-Trust or Anti-Consumer?*, 37 *Minn. L. Rev.* 227 (1953). Addresses, Austern, *Tabula in Naufragio—Administrative Style; Some Observations on the Robinson-Patman Act*, *Anti-trust Law Symposium* 1953, p. 105; Mason, *Discrimination in Price between Different Purchasers of Commodities of Like Grade, Quality and Popularity*, *Proceedings*, *supra* note 40 at 82; Dawkins, *Quantity and Cumulative Volume Discounts*, 1953 *Institute Federal Antitrust Laws*, University of Michigan Law School. See note 92 *infra*. See also *Price Discrimination under Federal Law*, 15 *N.A.M. Law Dig. No. 3* (June-Sept. 1953).

⁷⁰ 1952 *Annual Surv. Am. L.* 288 and n.33, 28 *N.Y.U.L. Rev.* 319 and n.33 (1953).

⁷¹ *B. F. Goodrich Co. v. FTC*, 1953 *CCH Trade Cases* ¶ 67,535.

⁷² 316 *U.S.* 407 (1942).

Communications Commission would "disrupt appellant's broadcasting system and seriously disorganize its business."⁷³ In that case, the Supreme Court held that those affected by an administrative regulation and order may resort to civil action for the purpose of avoiding "reasonable anticipation of irreparable injury." As a result, the court of appeals requested the district court to entertain the cases as "an initial step," making it quite clear at the same time, however, that it was not in any way passing upon the validity of the Commission's order.

Buyer's Liability.—The United States Supreme Court has now handed down its first decision involving the burden of proof under Section 2(f) of the Robinson-Patman Act, which makes a buyer liable who "knowingly" receives a discriminatory price.⁷⁴ The court of appeals decision⁷⁵ had clearly placed the burden of proving cost justification upon the buyer but was reversed by a six-to-three decision of the Supreme Court. An interesting sidelight is thrown upon this important decision by the fact that it was the new chairman of the FTC, Mr. Howrey, who appeared for the victorious respondent before our highest court. The majority opinion written by Mr. Justice Frankfurter admitted that under a literal reading of Section 2(b) of the Act, the burden of the proof would be "upon the person charged with the violation of this section." However, it was the majority's view that such literal interpretation would throw an economically intolerable burden upon a respondent buyer. In calling the language of Section 2(b) "infelicitous," Mr. Justice Frankfurter expressed doubt whether that section had any direct applicability in cases involving buyer's responsibility under Section 2(f). He observed that the Commission's conclusion of throwing upon the buyer the entire burden of introducing evidence with regard to his knowledge of the seller's cost justification "contradicts antitrust policy and the ordinary requirements of fairness." Mr. Justice Douglas, in his dissenting opinion, charges the majority with disregarding the history of the Act and with making the Commission prove "what lay in the buyer's mind."⁷⁶

⁷³ Id. at 414.

⁷⁴ Automatic Canteen Co. v. FTC, 346 U.S. 61 (1953).

⁷⁵ 194 F.2d 433 (7th Cir. 1952). See 1952 Annual Surv. Am. L. 289, 28 N.Y.U.L. Rev. 320 (1953).

⁷⁶ There appear to be more and more instances in which the hearing examiners exercise a hitherto unknown independence of judgment in passing upon the question whether proceedings instituted by the Commission should result in an order to cease and desist or should be initially dismissed. Thus, Hearing Examiner Kolb in a series of cases, In the Matter of Lever Bros., FTC Docket No. 5585, In the Matter of Colgate-Palmolive-Peet Company, FTC Docket No. 5587, In the Matter of Procter & Gamble Distributing Co., FTC Docket No. 5586, issued an order released on July 1,

The "Good Faith" Defense.—Under Section 2(b) of the Act, a seller may rebut a prima facie case of discrimination by a showing that his lower price "was made in good faith to meet an equally low price of a competitor." It may be recalled that the FTC in the *Standard Oil* case⁷⁷ took the position that the good faith defense was not an absolute defense wherever the Commission could establish that the seller's lower price had an adverse effect on competition. The Supreme Court, however, ruled in a five-to-three decision, that:

... it is a complete defense to a charge of price discrimination for the seller to show that its price differential has been made in good faith to meet a lawful and equally low price of a competitor.⁷⁸

The case was accordingly remanded to the Commission, which, on remand, now expressly found that the burden of establishing the good faith defense had not been met by the Standard Oil Company.⁷⁹ Since that time and in view of pending legislation in Congress to make the defense absolute by an amendment to the statute, the "new" Commission appears to have changed its position. In a letter of June 16, 1953, from its Chairman to the Chairman of the Senate Committee on the Judiciary, the Commission said:

We believe that the right to meet a lower price which a competitor is offering to a customer, when this is done in good faith, is the essence of competition and must be permitted in a free competitive economy.⁸⁰

Exclusive Dealing and Tie-In Agreements.—Having lost the *Automatic Canteen* case,⁸¹ the FTC got an even break by the Supreme Court's final decision in the *Motion Picture Advertising* case.⁸² It

1953, dismissing the complaints involving alleged preferential price treatment by the respondents of those customers who had facilities for storage and warehouse stocking of large quantities of merchandise. On the other hand, the Commission did issue an order on January 12, 1953, to cease and desist against the National Lead Company and numerous other respondents, FTC Docket No. 5253 (with Commissioner Carretta not participating and Commissioner Mason writing a strong dissent), enjoining them from using their zone-delivery pricing method, including the granting of certain discounts to some of its customers and the withholding thereof from others.

The only recent court decision involving an interpretation of the brokerage provision of the Act, Section 2(c), was *Independent Grocers Alliance Distributing Co. v. FTC*, 203 F.2d 941 (7th Cir. 1953), in which the court of appeals affirmed the Commission's order, which had found that the respondent had unlawfully accepted brokerage from concerns while, in fact, acting as an intermediary for the buyer. The court observed that there was "abundant authority" to the effect that intermediaries acting in behalf or under the control of buyers may not receive brokerage payments upon the purchases of such buyers.

⁷⁷ *Standard Oil Co. v. FTC*, 340 U.S. 231 (1951).

⁷⁸ *Id.* at 246.

⁷⁹ See 1952 Annual Surv. Am. L. 300-01, 28 N.Y.U.L. Rev. 331-32 (1953).

⁸⁰ 15 N.A.M. Law Dig. 37 (June-Sept. 1953).

⁸¹ *Automatic Canteen Co. v. FTC*, 346 U.S. 61 (1953).

⁸² *FTC v. Motion Picture Advertising Serv. Co.*, 344 U.S. 392 (1953). See 1952 Annual Surv. Am. L. 294 et seq., 28 N.Y.U.L. Rev. 325 et seq. (1953).

may be recalled that the Commission—over the dissent of Commissioner Mason—charged a distributor of so-called “trailer ads” with violation of Section 5 of the Federal Trade Commission Act on the ground that the leasing of commercial advertising material to exhibitors for a period exceeding one year and on condition that no similar advertising matter be received from others was an unfair method of competition. No mention was made in the Commission’s complaint of Section 3 of the Clayton Act. Although the court of appeals had unanimously ruled against the Commission and even suggested that the complaint should have been dismissed for lack of public interest,⁸³ only two justices of the Supreme Court, Mr. Justice Frankfurter and Mr. Justice Burton, agreed with the lower court. The majority held that respondent’s exclusive contracts unreasonably restrained competition since respondent and three other competitors had foreclosed about 75 per cent of all available outlets for this particular business.

It is, we think, plain from the Commission’s findings that a device which has sewed up a market so tightly for the benefit of a few falls within the prohibitions of the Sherman Act and is therefore an “unfair method of competition” within the meaning of Section 5(a) of the Federal Trade Commission Act.⁸⁴

With regard to the argument that the Commission’s order, restricting the enforceability of respondent’s leases to a one-year term, was commercially detrimental to respondent’s business, the Court refused to substitute its own judgment for that of the Commission:

The precise impact of a particular practice on the trade is for the Commission, not the courts, to determine. The point where a method of competition becomes “unfair” within the meaning of the Act will often turn on the exigencies of a particular situation, trade practices, or the practical requirements of the business in question.⁸⁵

There is some indication that even the “new” Commission will apply rather strict standards in determining the validity of exclusive-dealing arrangements under either Section 3 of the Clayton Act or Section 5 of the Federal Trade Commission Act. Thus, an order to cease and desist has just been issued against Dictograph Products, Inc.,⁸⁶ denying the latter’s appeal from an initial decision by the hearing examiner who had refused to dismiss the complaint. The order enjoins the respondent from enforcing or continuing in operation its distribution system under which the distributors of respondent’s hearing aids agreed not to handle a competitor’s product. The

⁸³ 194 F.2d 633 (5th Cir. 1952).

⁸⁴ 344 U.S. 392, 395 (1953).

⁸⁵ *Id.* at 396.

⁸⁶ In the Matter of Dictograph Products, Inc., 3 CCH Trade Reg. Rep. ¶ 11,526 (1953).

distribution contract further provided that after termination by either party the distributor would not engage in the same business in the same sales area for a period of one year. It is pointed out in Commissioner Carretta's opinion that all five Commissioners considered these contracts in violation of Section 3 of the Clayton Act while the Chairman and Commissioner Mason deemed it unnecessary to pass upon the alleged violation of Section 5 of the Federal Trade Commission Act in view of the established violation of Section 3. The Commission found that respondent sold its equipment to approximately 220 well-established distributors and rigidly enforced the exclusive-dealing provision by terminating agreements with those distributors who were found engaged in selling one or more competitor's products at the same time. The respondent's argument that their distribution system was justified as a result of special school instruction and information furnished to its distributors was held to be no justification under Section 3 of the Clayton Act in view of the fact that the evidence before the hearing examiner was held to have established an adverse effect on competition:

By the Clayton Act, Congress designated exclusive dealing contracts as unreasonable restraints on trade where their effect may be to substantially lessen competition. That test is met here where one of the largest producers in the field has tied up a substantial portion of the established retail outlets with exclusive dealing contracts containing such termination provisions, and where the contracts not only tend to foreclose a substantial portion of the market to respondent's competitors, but also deny competitive opportunities to respondent's distributors.⁸⁷

IV

THE ANTITRUST LAWS

The demand for a thorough re-examination of our existing anti-trust laws has, of course, been enormously stimulated as a result of the change in administration last November. Congressional committees, bar associations, private trade groups such as the International Chamber of Commerce, and the Government itself have developed programs, issued preliminary reports and in many instances are, at the time of this writing, busily engaged in formulating detailed agenda for systematic study of the entire field. Chronologically speaking, the first major step was taken in the Report of the Business Advisory Council to the Secretary of Commerce entitled "Effective Competition."⁸⁸ The issuance of this report was one of the last official acts of

⁸⁷ Ibid.

⁸⁸ Report to Secretary of Commerce Sawyer by his Business Advisory Council, with a letter of comment from Mr. Sawyer, Dec. 18, 1952. N.Y. Times, Dec. 22, 1952, p. 32, col. 8.

former Secretary of Commerce Sawyer. In February the Section on Antitrust Laws of the New York State Bar Association devoted a full day's session to a discussion of current antitrust problems, offering many valuable and important suggestions for revision of the Sherman and Clayton Acts.⁸⁹ Shortly thereafter, the recently formed Antitrust Section of the American Bar Association held its spring meeting in Washington, D.C., and discussed recommendations for the improvement of antitrust law enforcement.⁹⁰ Also in April, 1953, the American Law Institute published its report on possible work by the American Law Institute in the field of antitrust and patent law.⁹¹

During the middle of June, the University of Michigan arranged a comprehensive institute on the Federal Antitrust Laws, in which many outstanding antitrust experts participated.⁹² At about the same time, the University of Chicago Law School, under the leadership of Dean Levi, conducted a thorough two weeks seminar on various aspects of the antitrust laws.⁹³

The most significant development, however, occurred shortly before and at the time of the Boston meeting of the American Bar Association. At that time, Judge Barnes, Assistant Attorney General in charge of the Antitrust Division, offered his first major address

⁸⁹ The proceedings of the meeting held February 18-19, 1953, have been published by Commerce Clearing House as "Antitrust Law Symposium 1953." Among the major addresses are Morison, *Investigation by Grand Jury Subpoena and Other Discovery Processes*, p. 24; Seymour, *The Big Subpoena: Proceedings to Quash or Limit: Compliance*, p. 32; Hansard, *U.S. Antitrust Process Beyond Our Borders: Jurisdiction and Comity*, p. 44; Reed, *A Re-examination of the Federal Antitrust Law*, p. 55; Oppenheim, *Needed Revisions in National Antitrust Policy*, p. 70; McCracken, *The Federal Antitrust Law from the Viewpoint of a Business Lawyer*, p. 85; Mason, *A Federal Trade Commissioner's Aims and Aspirations*, p. 62; Berle, *Antitrust Law Enforcement and Economic Policy in Industry*, p. 96; Austern, *Tabula in Naufragio—Administrative Style; Some Observations on the Robinson-Patman Act*, p. 105; Rifkind, *Divisions of Territory Under the Antitrust Laws*, p. 173; Hodson, *The Manufacturer's Right to His Dealer's Loyalty in the Light of the M.P.A. Case*, p. 186; Dean, *Supervision of Selling*, p. 201; Schwartz, *Relations with Affiliated Customers*, p. 214.

⁹⁰ The proceedings of this meeting held April 1-2, 1953, have been published by the American Bar Association Section of Antitrust Law. Major addresses included: Dunn, *Recommendations of Business—Summary of Report to the Secretary of Commerce by Business Advisory Council*, p. 7; Ferguson, *Recommendations from Congress—A Congressional Viewpoint on Current Antitrust Problems*, p. 13; Prettyman, *Recommendations from the Courts*, p. 27; Van Cise, *Recommendations from the Bar—What is Not Wrong with Our Antitrust laws*, p. 34; Fuller, *Problems Ahead for "Big Business"*, p. 60; Chaffetz, *The Antitrust Laws and Small Business*, p. 77; De Bevoise, *Problems of Pricing*, p. 91; Timberg, *Problems of International Business*, p. 106.

⁹¹ This major research project was made possible, as stated by Judge Goodrich, director of the American Law Institute, by a generous grant from the Alfred P. Sloan Foundation, Inc.

⁹² A summary of the high spots of this symposium will be published in a forthcoming issue of the American Bar Association Journal.

⁹³ The writer is informed that at least some of the individual papers presented at this symposium will be published in various law reviews in the near future.

entitled "The Judge Looks at Antitrust."⁹⁴ Shortly before that time the Attorney General, in an address entitled "Our Antitrust Policy," outlined the program of the new administration.⁹⁵ In that speech, the Attorney General announced his plan to set up The Attorney General's National Committee to Study the Antitrust Laws, which has since been established under the cochairmanship of Judge Barnes and Professor S. Chesterfield Oppenheim of the University of Michigan Law School and has already commenced its work of a thoroughgoing study of all aspects of the antitrust laws. President Eisenhower, in commenting on the importance of the work of this national committee, has stated:

I believe that the Attorney General's National Committee to study the Anti-trust Laws will provide an important instrument to prepare the way for modernizing and strengthening our laws to preserve American free enterprise against monopoly and unfair competition. It is requested that all departments and agencies of the Federal Government give full cooperation to insure its success.⁹⁶

At the meeting of the American Bar Association at Boston, Professor Oppenheim delivered a major address on "The Organization of the Attorney General's National Committee to Study the Antitrust Laws" and announced, at the same time, the names of more than fifty experts from all over the United States who had been invited to serve on the committee.⁹⁷ In commenting upon the Committee's program, Cochairman Oppenheim said:

The Committee will be dealing with antitrust laws often characterized as having the dignity of a constitutional provision. Indeed, antitrust deals with economic liberty, the correlative of civil liberty. This makes antitrust a policy that transcends any particular Administration. There are bound to be differences of view concerning the reach of antitrust enforcement and the compatibility of specific types of enforcement action with the underlying objectives of the antitrust laws. If all members of the Committee are guided by what is best for the national economy in antitrust statecraft, the public interest will coincide with legitimate interests of private competitive enterprise.⁹⁸

Since the American Bar Association meeting, the Attorney General has indicated that suggestions for revisions of the antitrust laws are expected to be ready for presentation to Congress at its next session but that to recommend changes in the laws "does not mean

⁹⁴ Proceedings, *supra* note 40, at 13.

⁹⁵ Dep't of Justice Press Release, June 26, 1953. Address before the Judicial Conference of the Fourth Circuit, White Sulphur Springs, W. Va., June 26, 1953.

⁹⁶ *Id.* at 11.

⁹⁷ The names of the experts were published in *N.Y. Times*, Aug. 28, 1953, p. 8, col. 4.

⁹⁸ Proceedings, *supra* note 40, at 20, 27-28.

that enforcement of existing antitrust policies will be relaxed.⁹⁹ The work of the national committee will undoubtedly be greatly facilitated by the valuable papers presented at the meeting of the Section of Antitrust Law of the American Bar Association, which, for the first time, conducted a "Symposium on an Antitrust Dictionary."¹⁰⁰

There have also been some outstanding developments during 1953 in regard to research on the international aspects of the antitrust laws. In the spring of 1953, the Ad Hoc Committee of United Nations Economic and Social Council concluded its report and analysis on restrictive business practices.¹⁰¹ In addition to the report proper, the Committee has published "An Analysis of Governmental Measures Relating to Restrictive Business Practices," in which a comparative study is offered of the pertinent legislative and administrative regulations of all major countries of the world. At about the same time, the United States Council of the International Chamber of Commerce issued a report suggesting important amendments to the Sherman Act in its international aspects,¹⁰² particularly with regard to the use of wholly owned subsidiaries in foreign countries and licensing problems with regard to export and import trade. During the summer, the Committee on International Trade Regulation of the American Bar Association prepared a thorough report on the "Impact of Antitrust Laws on Foreign Trade," which has been separately printed and was subsequently submitted to the Association's meeting at Boston.¹⁰³ This Committee concludes its report with a series of recommendations to be considered by the Attorney General's newly appointed National Committee, in connection with the operation of the antitrust laws in foreign commerce.

No wonder that, in view of this tremendous activity on all fronts, numerous important contributions to the general literature on the antitrust laws have also been made during the last year.¹⁰⁴

⁹⁹ N.Y. Times, Oct. 11, 1953, p. 77, col. 1.

¹⁰⁰ Proceedings, *supra* note 40, at 38. This dictionary symposium consists of the following contributions: Handler, Contract, Combination or Conspiracy, p. 38; Bergson, In Restraint Of, p. 49; Searls, Trade or Commerce Among the Several States or With Foreign Nations, p. 58; Johnston, Monopolize or Attempt to Monopolize, p. 72; Mason, Discriminate in Price Between Different Purchasers of Commodities of Like Grade, Quality and Popularity, p. 82; Mattson, Condition that the Lessee or Purchaser Shall Not Deal in the Goods of a Competitor, p. 97; Adelman, Acquire the Whole or Any Part of the Stock or Assets of Another Corporation, p. 111; McAllister, Where the Effect May Be to Substantially Lessen Competition or Tend to Create a Monopoly, p. 124.

¹⁰¹ UN Eco. & Soc. Council, Restrictive Business Practices, E/2379 and additions, E/OR, 16th Sess., Supps. 11, 11A, 11B (March 20, 1953).

¹⁰² Amendment Urged to East Trust Act, N.Y. Times, April 15, 1953, p. 47, col. 5.

¹⁰³ Report of Bar Ass'n, Section of International and Comparative Law, Aug. 6, 1953.

¹⁰⁴ Among books published in this period, mention should be made of the interesting

Legislative Developments.—While major studies and investigations aiming at re-examination of the antitrust laws are under way, actual legislative activity in this area has been insignificant. The provisions of the Defense Production Act of 1950, which authorized the approval of voluntary agreements among industry members and exempts them from prohibitions of the antitrust laws, have been extended for a two-year period.¹⁰⁶ The Small Business Act of 1953¹⁰⁸ has established a Small Business Administration. This administration replaces the Small Defense Plants Administration. Under the new Act, the president is authorized to consult with representatives of small business for the purpose of encouraging them to enter into voluntary agreements which, if approved by the president as being

book by Lillenthal, *Big Business: A New Era* (1952), reviewed in 53 Col. L. Rev. 894 (1953), 41 Geo. L.J. 591 (1953).

Articles: Bowman, *Toward Less Monopoly*, 101 U. of Pa. L. Rev. 577 (1953); Carlston, *Role of the Antitrust Laws in the Democratic State*, 47 N.U.L. Rev. 587 (1952); Hale & Hale, *Monopoly and Mobilization: The Conflict between Direct Controls and the Antitrust Laws*, 47 N.U.L. Rev. 606 (1952); Jewkes, *The Nationalization of Industry*, 20 U. of Chi. L. Rev. 615 (1953); Levi, *A Two Level Anti-Monopoly Law*, 47 N.U.L. Rev. 567 (1952); Linbaugh, *Historic Origins of Antitrust Legislation*, 18 Mo. L. Rev. 215 (1953); Loevinger, *Antitrust and the New Economics*, 37 Minn. L. Rev. 505 (1953); Morison, *Is the Sherman Act Outdated?*, 1 J. Pub. L. 323 (1953); Ruebhausen & von Mehren, *The Atomic Energy Act and the Private Production of Atomic Power*, 66 Harv. L. Rev. 1450 (1953); Wham, *The Growth of Antitrust Law: A Revision is Long Overdue*, 38 A.B.A.J. 934 (1952); Wham, *Antitrust Laws and Their Interpretation: Some Defects and Suggested Changes*, 39 A.B.A.J. 883 (1953); Note, *Diminishing Applicability of the Antitrust Laws In Regulated Industry: Congress, the Courts and the Agencies*, 28 Ind. L.J. 194 (1953).

With regard to the procedural aspects of the antitrust laws, see particularly Adams, *The Sherman Act and Its Enforcement*, 14 U. of Pitt. L. Rev. 319 (1953); Buttle, *Trial Problems in Antitrust Litigation*, 19 Brooklyn L. Rev. 169 (1953); Committee on Antitrust Procedure of the Section on Antitrust Law of the New York State Bar Ass'n, *Current Indexing of the Record*, 13 F.R.D. 85 (1952); Holtzoff, *Demonstration of Pre-Trial Procedure in an Antitrust Case Involving Patent Issues*, 13 F.R.D. 207 (1952); Ryan, *A Judicial Solution to the Procedural Problems of the So-Called Big Case*, 41 Geo. L.J. 182 (1953); Wilson, *The Origin and Limited Life of the Antitrust Cause of Action*, 21 Kan. City L. Rev. 127 (1953); Decision, *Unclean Hands as a Defense to a Private Antitrust Action*, 53 Col. L. Rev. 739 (1953).

With regard to the international aspects see round-table discussion by Timberg, Diggs, Derenberg & Oppenheim, *The Impact of the Anti-Trust Laws on Patents and Trade-Marks in Foreign Commerce*, presented at the meeting of the American Patent Law Association, March 21, 1952, printed in 21 Geo. Wash. L. Rev. 663 (1953); the comprehensive study made by Hale & Hale, *Monopoly Abroad: The Antitrust Laws and Commerce in Foreign Areas*, 31 Texas L. Rev. 493 (1953).

Mention may also be made of The MacQuarrie Report and the Reform of Combines Legislation, 30 Can. B. Rev. 549 (1953), discussing various aspects of the monopoly problem in Canada. Other law review articles will be referred to under specific subdivisions of this article.

¹⁰⁶ Pub. L. No. 95, 83d Cong., 1st Sess., (June 30, 1953), amending Pub. L. No. 774, 81st Cong., 2d Sess. (Sept. 8, 1950). See Noirwood, *Function of the Antitrust Division under the Defense Production Act of 1950*, 24 Miss. L.J. 228 (1953).

¹⁰⁸ Pub. L. No. 163, 83d Cong., 1st Sess. (July 30, 1953).

in the public interest, are also exempt from the prohibitions of the antitrust laws.

Under the provisions of the Rubber Producing Facilities Disposal Act of 1953,¹⁰⁷ a commission is set up for the purpose of "securing guidance as to the type of disposal program which would best foster the development of a free competitive synthetic rubber industry." The Attorney General is required to render an opinion to the newly formed commission with regard to whether any proposed disposition may violate the antitrust laws.¹⁰⁸

*The Antitrust Laws and Patents.*¹⁰⁹ *The General Electric Case.*—Early in August, Judge Forman rendered his opinion with regard to the terms of the final judgment in the incandescent lamp case, which may have far-reaching implications with regard to the scope of relief to which the Government may be held entitled in cases involving patent misuses.¹¹⁰ It will be recalled that four years ago the same judge had handed down an elaborate opinion on the merits of the *General Electric* case, finding the respondent guilty of antitrust violations both with regard to their patents and the use of the trade-mark "Mazda."¹¹¹ It took four years after that decision for the Government and General Electric to prepare briefs and submit proposed forms of judgment. In its final judgment, covering almost 100 pages, the court for the first time granted the Government's request for complete dedication by General Electric and its licensees of all existing patents on lamps and lamp parts, but not on lamp machinery. This is believed to be the first court decision in which a royalty-free dedication to the public of all existing patents with regard to a certain line of products has been decreed by a federal court. With regard to existing patents on lamp machinery, General Electric was required to make these patents available on a nonexclusive royalty-license basis to all interested parties during their unexpired terms. General Electric was similarly required to grant nonexclusive licenses on a reasonable royalty basis for a period of five years with regard to all future

¹⁰⁷ Pub. L. No. 205, 83d Cong., 1st Sess. (August 7, 1953).

¹⁰⁸ Numerous bills, seeking to amend the antitrust laws, which were not acted upon during the first session of the 83d Congress (such as H.R. 2237, which seeks to increase the maximum penalty for violation of the Sherman Act from \$5,000 to \$50,000, and which had already passed the House), are listed in 1 CCH Trade Reg. Rep. 951 et seq. (1953).

¹⁰⁹ See Clapp, Some Recent Developments in Patent-Antitrust Law, 36 Marq. L. Rev. 143 (1952); Frost, Misuse of Patents in Relation to the Patent Code, 1953 Institute on Federal Antitrust Laws, University of Michigan (not yet published); Recent Case, 66 Harv. L. Rev. 541 (1953). With regard to the relationship between the antitrust laws and copyright see Finkelstein, Antitrust Laws and the Arts, U. of Chi. Law School Conf. Series No. 10 (May 1952).

¹¹⁰ United States v. General Electric Co., 115 F.Supp. 835 (D.N.J. 1953).

¹¹¹ United States v. General Electric Co., 82 F. Supp. 753 (D.N.J. 1949).

patents concerning lamps, lamp parts and lamp machinery; the court decree provides, however, upon General Electric's request, that in these cases of future licensing on a reasonable royalty basis, the prospective licensees must give a cross license to General Electric on a nonexclusive basis. With regard to the trade-mark "Mazda," General Electric was restrained from using the mark in connection with more than 1 per cent of its sales of lamps in any one calendar year. Moreover, General Electric was enjoined for a period of three years from authorizing any other person in the United States to use one of General Electric's trade-marks on his lamps or from using anybody else's trade-mark on General Electric lamps offered for sale in the United States.

The court did not, however, grant the Government's request for a complete divestiture and separation of General Electric's corporate setup on the ground, *inter alia*, that divestiture of General Electric's lamp productive facilities would have an adverse effect on national defense, would not be in the interest of the general public and would, in any event, be almost a practical impossibility.

The Government's plea for divestiture of General Electric's foreign stockholdings was similarly denied by Judge Forman on the ground that it was unnecessary and would be contrary to this country's public policy of encouraging investment of American capital abroad.¹¹²

*Monopoly, Monopolization and Tie-In Agreements:*¹¹³ *The Times-Picayune Case.*—¹¹⁴ The only Supreme Court decision of major significance in the field of antitrust law during 1953 (with the exception of the *W. T. Grant* case, *infra*)¹¹⁵ was its five-to-four decision in

¹¹² Another civil antitrust action against General Electric which had been instituted in 1945 under § 1 of the Sherman Act and §§ 73 and 74 of the Wilson Tariff Act (Civ. No. 45-75, Jan. 18, 1945), charging General Electric and its subsidiary, International General Electric Co., with restraining foreign commerce in electrical equipment, was settled in October 1953, with the entry of a consent judgment before the same judge who decided the above-mentioned case. The consent decree provides for cancellation or modification of certain international agreements and the making available on a non-exclusive, reasonable royalty basis, of approximately 600 patents relating to electrical equipment. The decree is printed in full in 1953 CCH Trade Cases ¶ 67,585. For other recent cases involving patent misuses and the antitrust laws, see *Ronson Patents Corp. v. Sparklets Devices, Inc.*, 112 F. Supp. 676 (E.D. Mo. 1953); *Texas Co. v. Globe Oil & Refining Co.*, 112 F. Supp. 455 (N.D. Ill. 1953).

¹¹³ See Notes, Federal anti-trust acts as applied to publishers of newspapers or other periodicals—federal cases, 96 L. Ed. 174 (1951); *The Supreme Court, 1951 Term: Government Regulation: Antitrust*, 66 Harv. L. Rev. 89, 137 (1952); *Decisions*, 52 Col. L. Rev. 1066 (1952); 53 Col. L. Rev. 874 (1953); 47 N.U.L. Rev. 733 (1952); 101 U. of Pa. L. Rev. 550 (1953).

¹¹⁴ *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594 (1953). See 1952 Annual Surv. Am. L. 303 et seq., 28 N.Y.U.L. Rev. 334 et seq. (1953).

¹¹⁵ *United States v. W. T. Grant Co.*, 345 U.S. 629 (1953), affirming 112 F.Supp. 336 (S.D.N.Y. 1952).

the *Times-Picayune* case. The Government had charged that the respondent had violated Sections 1 and 2 of the Sherman Act by insisting that its advertisers buy space simultaneously in both its morning paper and evening paper at a compulsory unit rate. Mr. Justice Clark, speaking for the majority, held that the Government had failed to sustain its charges under either of these sections, primarily because the evidence did not establish that the morning paper, the "tying product," was "sufficiently dominant" in the New Orleans newspaper market. The majority was careful, however, to limit its decision to the specific facts involved in this case without passing upon the legality of similar arrangements "in other circumstances or in other proceedings." Mr. Justice Clark summarized the majority's attitude toward tie-in agreements as follows:

The common core of the adjudicated unlawful tying arrangements is the forced purchase of a second distinct commodity with the desired purchase of a dominant "tying" product, resulting in economic harm to competition in the "tied" market. Here, however, two newspapers under single ownership at the same place, time, and terms sell indistinguishable products to advertisers; no dominant "tying" product exists (in fact, since space in neither the *Times-Picayune* nor the *States* can be bought alone, one may be viewed as "tying" as the other); no leverage in one market excludes sellers in the second, because for present purposes the products are identical and the market the same. . . . In short, neither the rational nor the doctrines evolved by the "tying" cases can dispose of the Publishing Company's arrangements challenged here.¹¹⁰

Perhaps the most interesting feature of the *Times-Picayune* case is, however, the fact that the Government's case was based entirely on Sections 1 and 2 of the Sherman Act and not on Section 3 of the Clayton Act, which specifically outlaws tie-in agreements. It was apparently the Government's position that advertising space was not "a commodity" within the meaning of Section 3 of the Clayton Act. The majority opinion expresses no view on this important question of interpretation.¹¹⁷ The four minority justices agreed with the district court's opinion that the "*Times-Picayune*" enjoyed a monopolistic position, at least with regard to advertising in the morning papers, and that the compulsory unit advertising was an outgrowth of such

¹¹⁰ 345 U.S. 594, 614 (1953).

¹¹⁷ *Id.* at 609 n.27. See the illuminating comment on this point in Mattson's contribution to the "Dictionary" Symposium, Proceedings, *supra* notes 40 and 100, at 97. Mattson states: "The Court seemed to invite an attack upon unit advertising space arrangements based upon Section 3 when it concluded with the statement: 'We do not determine that unit advertising arrangements are lawful in other circumstances or other proceedings. Our decision adjudicates solely that this record cannot substantiate the Government's view of this case.'" *Id.* at 101. (Emphasis supplied by Mattson).

monopolistic domination of the market, and, therefore, in violation of the Sherman Act.

The Shoe Machinery Monopoly.—While the *Times-Picayune* case involved primarily the legality of a tying agreement, Judge Wyzanski's recent opinion in the *United Shoe Machinery Company* case¹¹⁸ constitutes by far the most important recent judicial pronouncement with regard to the monopoly section of the Sherman Act. This was the third Government proceeding against this particular respondent¹¹⁹ and finally resulted in a decision to the effect that the respondent's leasing system with regard to its shoe machinery was illegal and that in order to dissipate the effects of respondent's monopolization, the following drastic relief was granted:

(1) The respondent must offer for sale every type of machine which it now leases, although it will remain free to continue existing leases for a period of five years;

(2) The respondent is required to discontinue from acting as distributor of other companies' supplies and is ordered to dispose of its branches and subsidiaries which manufacture nails, tacks and eyelets;

(3) Respondent is ordered to make its patents available upon a reasonable royalty basis to all those who wish to manufacture shoe machinery and supplies.

Judge Wyzanski held, in effect, that the respondent's conduct was the exercise of monopoly power, which was "to a substantial extent the result of barriers erected by its own business methods."¹²⁰ However, the Government's far-reaching request for a dissolution of the respondent into three manufacturing concerns was denied. Judge Wyzanski considered this proposal to be "unrealistic." Said he: "It takes no Solomon to see that this organism cannot be cut into three equal and viable parts."¹²¹

*The Antitrust Laws and Investment Banking: The Morgan Case.*¹²²—The sensational case in which the Government had charged all leading investment bankers and security houses with violation of Sections 1 and 2 of the Sherman Act came to a close with the rendition of Judge Medina's 424-page opinion, dismissing the Government's

¹¹⁸ *United States v. United Shoe Machinery Corp.*, 110 F.Supp. 295 (D. Mass. 1953). See Note, 41 Geo. L.J. 587 (1953).

¹¹⁹ The first two were *United States v. Winslow*, 227 U.S. 202 (1913); *United States v. United Shoe Machinery Co.*, 247 U.S. 32 (1918).

¹²⁰ The court relies for the statement of the quoted rule on Judge Learned Hand's opinion in *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) and the Supreme Court's opinion in *United States v. Griffith*, 334 U.S. 100 (1948).

¹²¹ 110 F.Supp. 295, 348 (D. Mass. 1953).

¹²² *United States v. Morgan*, 1953 CCH Trade Cases ¶ 67,586.

case in its entirety, *i.e.*, both with regard to Section 1 and Section 2. Said Judge Medina at the end of his opinion:

I have come to the settled conviction and accordingly find that no such combination, conspiracy and agreement as is alleged in the complaint, nor any part thereof, was ever made, entered into, conceived, constructed, continued or participated in by these defendants, or any of them.

Since there was no combination, the monopoly charges fall of their own weight.¹²³

The court held that the syndicate system charged to be a conspiratorial device was motivated only by "normal business considerations" and that as a whole, the respondent's conduct was well within the general business policies approved by the Securities and Exchange Commission. It was Judge Medina's conclusion that "the plain truth of the matter is that the legal questions now under discussion form an area of head-on collision between the SEC on the one hand and the Antitrust Division of the Department of Justice on the other."¹²⁴ The syndicate system was found to have no effect whatever on general market prices nor was there any evidence that the participating underwriters and dealers had intended for it to have any.

On the contrary, it is the general market prices of securities of comparable rating and quality which control the public offering price. . . .¹²⁵

Thus ended one of the most bitterly contested antitrust proceedings with a complete exoneration of all the respondents involved.¹²⁶

Sporting Events and the Antitrust Laws: The Baseball and Football Cases.—Late in October the Supreme Court heard argument in the three baseball cases,¹²⁷ in all of which the basic question whether

¹²³ *Id.* at ¶ 67,586, p. 68,832.

¹²⁴ As reported at 22 U.S.L. Week 2161 (S.D.N.Y. Oct. 20, 1953).

¹²⁵ 1953 CCH Trade Cases ¶ 67,586, p. 68,805.

¹²⁶ Probably to avoid a similar debacle, the Government recently "petitioned" the Colorado district judge before whom the case of *United States v. Cement Institute*, Civ. No. 1291, was pending, to dismiss the case. It will be recalled that in this civil action, filed in 1945, all major cement companies were charged with a conspiracy to fix noncompetitive prices on cement through the use of a multiple basing-point system. Since, in the meantime, the Supreme Court had decided, in the companion case instituted by the FTC under § 5 of the Federal Trade Commission Act, *FTC v. Cement Institute*, 333 U.S. 683 (1948), 1949 Annual Surv. Am. L. 401, and since the Cement Institute had meanwhile been dissolved and most of the respondents in the Colorado case were presently selling cement on an f.o.b. mill basis, the Government concluded that no substantial benefit to the public would result from a trial of this case, and therefore moved for its dismissal.

¹²⁷ *Toolson v. New York Yankees, Inc.*, 101 F.Supp. 93 (S.D. Cal. 1951), *aff'd* per curiam, 200 F.2d 198 (9th Cir. 1952); *Kowalski v. Chandler*, No. 2646, S.D. Ohio, Jan. 25, 1952, *aff'd* per curiam, 202 F.2d 413 (6th Cir. 1953); *Corbett v. Chandler*, No. 2589, S.D. Ohio, Jan. 25, 1952, *aff'd* per curiam, 202 F.2d 428 (6th Cir. 1953). An excellent review of the oral argument before the Supreme Court was published in

baseball and other sports are subject to the antitrust laws was involved. All three of these cases were private actions without government participation. The first of these cases involved a player who had belonged to the New York Yankees but who had refused to report to another club when his contract was assigned to it. Consequently, he was placed on the so-called ineligible list and no other team included in organized baseball was permitted to employ him until he had reported to the team to which he had been assigned. Charging that the agreements among the various major and minor baseball leagues constituted an illegal combination in restraint of interstate commerce, Toolson sought treble damages under the antitrust laws for loss of income. The district court dismissed the complaint for lack of jurisdiction, basing its ruling on the famous baseball decision of the Supreme Court in the *Federal Baseball Club* case,¹²⁸ in which the Court had held through Mr. Justice Holmes that the sport of baseball was not "commerce" and that, moreover, baseball was a primarily local transaction only incidentally involving interstate transportation. The plaintiff's attorney in the *Toolson* case argued before the Supreme Court that the *Federal League* case was wrong and should be overruled.¹²⁹ The second case¹³⁰ had likewise been dismissed in a per curiam decision of the Court of Appeals for the Sixth Circuit on the ground of lack of jurisdiction. This case, too, involved, inter alia, the so-called reserve clause involved in all professional baseball players' contracts, under which players are precluded from selling their own services to other clubs. During the oral argument, the plaintiff's attorney did not ask the court to overrule the *Federal League* case but sought to distinguish it on the ground that as a result of the advent of radio and television, the game of baseball had definitely assumed interstate characteristics and should be considered an important segment of commerce, which was now subject to the antitrust laws.

In the third case,¹³¹ the plaintiff was not a player but a club owner, who contended that the player-control regulations were in violation of the antitrust laws.

On November 9, 1953, the Supreme Court, in an unusually short

22 U.S.L. Week 3097 (U.S. Oct. 20, 1953): Recent Notes on the subject are Monopsony in Manpower: Organized Baseball Meets the Antitrust Laws, 62 Yale L.J. 576 (1953); Baseball Players and the Antitrust Laws, 53 Col. L. Rev. 242 (1953).

¹²⁸ *Federal Baseball Club v. National League*, 259 U.S. 200 (1922).

¹²⁹ 22 U.S.L. Week 3097 (U.S. Nov. 10, 1953).

¹³⁰ *Kowalski v. Chandler*, No. 2646, S.D. Ohio, Jan. 25, 1952, aff'd per curiam, 202 F.2d 413 (6th Cir. 1953).

¹³¹ *Corbett v. Chandler*, No. 2589, S.D. Ohio, Jan. 25, 1952, aff'd per curiam, 202 F.2d 428 (6th Cir. 1953).

per curiam opinion, refused to overrule or even reconsider the old *Baseball Club* case on the ground that it was up to Congress rather than the Court to bring the sport of baseball within the ambit of the antitrust laws:

The business has thus been left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation. The present cases ask us to overrule the prior decision and, with retrospective effect, hold the legislation applicable. We think that if there are evils in this field which now warrant application to it of the antitrust laws it should be by legislation.¹³²

In the meantime, the Government, while not participating in the baseball cases, had instituted a civil proceeding against the National Football League,¹³³ in which certain agreements entered into by the League and professional football clubs with regard to the televising and broadcasting of professional football games were attacked as violative of the Sherman Act. Under the League's bylaws, each club was given the power to exclude all broadcasts and telecasts of professional football games of their clubs "within its home territory" on days when the particular club was playing a game itself. These restrictions were attacked by the Government as being illegal per se as a division of marketing territory and as an effective boycott.

*The Antimerger Act: Section 7 of the Clayton Act.*¹³⁴—There has been no authoritative court decision to this date with regard to that part of the amended Section 7 which prohibits mergers only in cases "where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly." The recent *Transamerica* case¹³⁵

¹³² 74 Sup. Ct. 78, 78-79 (1953). Justices Burton and Reed filed a dissenting opinion based primarily on the ground that in the light of the report by the Subcommittee on Study of Monopoly Power of the House Committee on the Judiciary, H.R. Rep. 2002, 82d Cong., 2d Sess. (1952), which had made an extensive study and held hearings with regard to this issue, the old baseball case should now be reconsidered with a view toward overruling the old decision.

¹³³ *United States v. National Football League*, Civ. No. 12,808 (Pa. 1953). Judge Grim held on Nov. 12, 1953, that notwithstanding the Supreme Court's decision in the baseball cases, *supra* note 132, the restrictions imposed by the National Football League on the sale of radio and television rights did involve interstate commerce and were therefore subject to the antitrust laws. 22 U.S.L. Week 2209 (E.D. Pa. Nov. 17, 1953). The Government has a similar suit pending against the International Boxing Club of New York, Civ. No. 74-81, S.D.N.Y., scheduled for hearing in December 1953.

¹³⁴ The most enlightening discussion of the amended Section 7 will be found in the article by Adelman, *supra* notes 40 and 100. See also McElroy, Section 7 of the Clayton Act and the Oil Industry, 5 *Baylor L. Rev.* 121 (1953); Notes, Stockholders' Derivative Suits for Treble Damages under the Clayton Act, 52 *Col. L. Rev.* 1069 (1952); Trade Regulation Developments, 15 *N.A.M. Law Dig.* 1 (1952); Stockholders' Suits and the Sherman Act, 5 *Stan. L. Rev.* 480 (1953); The Clayton Act, Section 7: Corporate Expansion by Acquisitions and Mergers, 27 *Tulane L. Rev.* 332 (1953).

¹³⁵ *Transamerica Corp. v. Board of Governors of the Federal Reserve System*,

still arose under the old Section 7. The Federal Reserve Board had ordered divestiture of stock in a group of bankers constituting the so-called Giannini group, but its ruling was reversed by the Court of Appeals for the Third Circuit last summer on the ground that the Federal Reserve Board had failed to show the necessary market effects under the evidence presented, even though the appellate court acknowledged the "tremendous concentration of banking capital" in the hands of the Transamerica group.

The only court decision which has thus far involved the amended Section 7 is the interesting private dispute between the Benrus Watch Company and the Hamilton Watch Company.¹⁸⁶ There, Benrus had purchased a large minority block of Hamilton stock and was sued by the latter for a preliminary injunction seeking to enjoin it from voting the stock thus acquired for the purpose of electing a director. In granting injunctive relief, the district court said with regard to the amended Section 7:

The effect of a merger of Hamilton and Benrus may be substantially to lessen the active competition now existing between the two in the sale of jewelled watches in the United States. By the same token such a merger would substantially lessen competition in the sale of jewelled watches in the United States.¹⁸⁷

The Court of Appeals for the Second Circuit recently sustained¹⁸⁸ the district court's holding on the ground that the lower court had not abused its discretion in issuing the injunction. With regard to the new Section 7, the court merely stated:

Although we now indulge in no ultimate conclusion, we believe the amendment of Section 7 in 1950 certainly casts doubt on decisions—including *International Shoe Co. v. F. T. C.*, 280 U.S. 291, and *United States v. Columbia Steel Co.*, 334 U.S. 495—interpreting that section as it stood previously. The Senate Committee Report stated that the intent of the amendment was "to cope with monopolistic tendencies in their incipency and well before they have attained such effects as would justify a Sherman Act proceeding." Interference at an early stage, if possible, seems the paramount aim.¹⁸⁹

Consequently, the new Section 7 still awaits judicial interpretation in its most important substantive aspects.

Nor has the attitude of the FTC, which is primarily charged with the enforcement of the Antimerger Act, been crystallized at the

206 F.2d 163 (3d Cir. 1953). The Government has recently applied for certiorari in this case. See Neal, *The Clayton Act and the Transamerica Case*, 5 *Stan. L. Rev.* 179 (1953).

¹⁸⁶ *Hamilton Watch Co. v. Benrus Watch Co.*, 114 F.Supp. 307 (D. Conn. 1953).

¹⁸⁷ *Id.* at 311.

¹⁸⁸ *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738 (2d Cir. 1953).

¹⁸⁹ *Id.* at 741-42.

time of this writing. Its first test case¹⁴⁰ involves an acquisition by Pillsbury Mills, one of the largest producers of flour and bake mixes, of the assets of two smaller concerns in the same field in 1951 and 1952. In his initial decision, the chief hearing examiner dismissed the complaint on the ground that the prosecution had not presented "reliable proof and substantial evidence" sufficient to support a charge under the amended Section 7. Specifically, he held that the prosecution had failed to show that Pillsbury's market position had increased so as to substantially lessen competition *generally* as a result of the acquisition of the assets of two competitors. An appeal has been taken from this initial decision to the full Commission, which recently heard the case but has not yet handed down its decision.

*Interlocking Directorates: Section 8 of the Clayton Act.*¹⁴¹—For the first time in many years, the Government has sought to enforce the provision in Section 8 against interlocking directorates. In *United States v. W. T. Grant, Inc.*¹⁴² the Government sought to enjoin the individual respondent from holding several directorships in competing corporations at the same time. However, when the individual defendant afterwards decided to resign from one directorship and not to stand for re-election in the second instance, the trial court dismissed the proceeding as moot and refused to issue an injunction against the director's future assumption of interlocking directorships. Nor was an injunction issued against the corporations involved. The United States Supreme Court affirmed the dismissal but without passing on the merits of Section 8 of the Clayton Act. The high tribunal simply held that the resignation did not render the case moot but that the lower court had shown no abuse of discretion in ruling that there was no "reasonable expectation" that either the corporations or the individual defendant would again violate the statute.

However, the Government succeeded in getting an interpretation of Section 8 at least by a lower court in the recent *Sears, Roebuck* case.¹⁴³ There, the director, who held office in Sears, Roebuck and B. F. Goodrich at the same time, refused to resign. In granting summary judgment for the Government, Judge Weinfeld stated the basic issue to be whether Sears, Roebuck and B. F. Goodrich were "competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions

¹⁴⁰ *FTC v. Pillsbury Mills, Inc.*, FTC Docket No. 6000, June 16, 1952.

¹⁴¹ See Report of the Chairman of the Clayton Act Committee, Proceedings, *supra* note 40, at 162 et seq.

¹⁴² 345 U.S. 629 (1953), affirming 112 F.Supp. 336 (S.D.N.Y. 1952).

¹⁴³ *United States v. Sears, Roebuck & Co.*, 111 F.Supp. 614 (S.D.N.Y. 1953).

of any of the antitrust laws." This question was answered in the affirmative on the ground that the quoted language did not require the same showing of effect on competition generally which was the test under the new Antimerger Act (Section 7 of the Clayton Act). The court said in this respect:

The vital distinction between Section 7 and Section 8, however, is that the latter omits the Section 7 test and promulgates its own substantiality standard in the form of the one million dollar size requirement. The omission of "substantially to lessen competition, or to tend to create a monopoly" from Section 8 in contradistinction to its inclusion in Section 7 and other sections of the same Act may not be deemed inadvertent. Were the defendants' construction to be adopted, it would require the application under Section 8 of a test which Congress appears deliberately to have omitted.¹⁴⁴

Subsequently, in his final judgment,¹⁴⁵ Judge Weinfeld ruled that the corporate defendants as well as the individual defendant were violating Section 8. He refused, however, to enjoin the individual defendant from serving in the future as a director of any two competing corporations as the Government had requested. He said:

The violation of the statute was committed by the individual defendant in accepting membership on the Boards of Directors of both corporations and by the latter in acquiescing therein over an extended period of years. However, the broad injunction proposed against future violations of the statute should be granted only where there is evidence showing a persistent purpose to violate or commit recurrences of the condemned act. No such proof has been submitted to me.¹⁴⁶

*The Antitrust Laws and International Cartels: The Standard Oil Case.*¹⁴⁷—In January 1953, the Government decided to drop its request for criminal indictment of five major American oil companies, charging them with world-wide monopoly practices.¹⁴⁸ It will be recalled that this case was the result of a report by the FTC charging seven companies with direct or indirect control of most of the world's

¹⁴⁴ Id. at 619.

¹⁴⁵ 1953 CCH Trade Cases ¶ 67,561.

¹⁴⁶ In *Lehman Bros. v. CAB*, Civ. No. 11,500, D.C. Cir. 1953, and *Pan American World Airways, Inc. v. CAB*, Civ. No. 11,503, D.C. Cir. 1953, not yet reported, Mr. Robert Lehman, a director for Pan American, had applied for permission from the CAB to serve simultaneously as director of United Fruit Company. The Board refused to grant the application under Section 409(a) of the Civil Aeronautics Act, and the Court of Appeals for the District of Columbia, in a two-to-one decision, recently held that there was sufficient competition between Pan American and United Fruit to warrant the Board's conclusion that such interlocking directorship might adversely affect the public interest.

¹⁴⁷ See Barnes, *Oil and the Antitrust Program*, Address before the National Congress of Petroleum Retailers, Inc., Aug. 20, 1953. See also Note, 31 N.C.L. Rev. 512 (1953).

¹⁴⁸ N.Y. Times, Jan. 12, 1953, p. 1, col. 1.

petroleum business. The grand jury investigation resulted in world-wide repercussions when a sweeping subpoena required the production of documents located in various foreign countries. Many countries, notably Great Britain, Belgium and Holland, forbade those companies which were subject to their jurisdictions to produce any documents in obedience to the subpoena. Recognizing the over-all importance of the problem of extraterritorial effect of our antitrust laws, Attorney General Brownell stated, in one of his recent addresses at the judicial conference of the fourth circuit:

... high on the priority list of problems demanding prompt solution is the entire problem of the extraterritorial application of the antitrust laws. This is a provocative subject, particularly in view of the oil case (*United States v. Standard Oil Company (New Jersey) et al.*), which according to the Committee on Foreign Commerce of the New York State Bar Association, "boldly presented the issue as to whether the United States antitrust laws apply to business operations abroad on the basis simply that they affect the United States." . . . grave and basic questions of international comity and of foreign relations, and of national security arise.¹⁴⁹

Subsequently, the Government started a civil antitrust proceeding against the oil companies, charging them with conspiracy and monopolization of interstate and foreign trade in petroleum and petroleum products.¹⁵⁰

V

TRADE-MARKS AND UNFAIR COMPETITION

Recent developments in the antitrust field and other public law aspects of trade regulation have, of course, far overshadowed the relatively minor new trends in the realm of the private law of trade-mark protection and unfair competition.¹⁵¹

¹⁴⁹ The entire problem is thoroughly discussed in Searls, *supra* notes 40 and 100.

¹⁵⁰ *United States v. Standard Oil Co.*, Civ. No. 1779-53; Dep't of Justice Press Release, April 27, 1953.

¹⁵¹ As in the past six years, all significant decisions and other developments in the trade-mark field have been discussed in the writer's comprehensive Report to the Patent, Trade-Mark and Copyright Section of the American Bar Association at its annual meeting. This year's report to the meeting, Derenberg, *The Sixth Year of Administration of the Lanham Trade-Mark Act of 1946*, is printed in full at 98 U.S.P.Q. No. 8, pt. II, p. 4, reprinted in 43 T.M. Rep. 779 (1953). In view of the limitation of space, only a brief survey will be made here with regard to the subject matter covered in the report. Of the few law review articles of recent date dealing with this subject, reference should be made to Ellwood, Coke & Dubonnet, 43 T.M. Rep. 323 (1953) (a survey of many recent trade-mark cases in the international field); and the excellent Note, Trade-Marks, Unfair Competition, and the Courts: Some Unsettled Aspects of the Lanham Act, 66 Harv. L. Rev. 1094 (1953). See also Conover, Comparative Trade-Mark Rights in Common Law and Civil Law, N.D.L. Rev. 33 (1953); Elledge, Trade Name Infringement as Unfair Competition, 40 Calif. L. Rev. 571 (1953); Garner, Narrow and Weak Trade-Marks, 22 Geo. Wash. L. Rev. 40 (1953); Hays, The California

A. Legislative Developments

In the domestic field, Sen. 2540,¹⁵² which seeks to amend the Trade-Mark Act of 1946, was introduced by Senator Wiley on July 31, 1953. This bill, which represents the combined efforts of all major bar associations, patent law associations, and interested trade associations, would clarify and modify the provisions of the now prevailing Act in numerous respects but also seeks to abolish those provisions of the Act of 1946 which give the FTC the power to apply for cancellation of registered trade-marks and which make a violation of the antitrust laws a substantive defense in infringement suits, even when such suits are based on registered trade-marks which have become "incontestable" under Section 15 of the Act. It is expected that hearings will be held on this bill early in 1954.

The only legislation directly affecting trade-marks which was passed during the year was an entirely unique bill which had been introduced for the purpose of preserving the trade-mark significance of the term "Aureomycin."¹⁵³ This bill amends Sections 502(1) and 507 of the Federal Food, Drug, and Cosmetic Act so as to substitute the generic name "chlortetracycline" for the term "Aureomycin." The bill was supported by the United States Department of Health, Education and Welfare and is probably the first instance in the history of trade-marks in the United States where a generic term has been recaptured as a valid trade-mark as a result of an act of Congress.

More important than any legislative development in the United States was the enactment in Canada of an entirely new trade-mark statute entitled "An Act relating to Trade Marks and Unfair Competition," which is expected to become effective on January 1, 1954.¹⁵⁴

Law of Unfair Competition Takes a Turn—Against the Employer, 41 Calif. L. Rev. 38 (1953); Sutherland, The Unmentioned Trade-Mark in a Business Transfer, 39 Va. L. Rev. 53 (1953); Note, Federal Jurisdiction over Unfair Competition, 37 Minn. L. Rev. 268 (1953); Case Comment, 6 U. of Fla. L. Rev. 256 (1953). See also Kennedy, The Lanham Act Construed as Applicable to Watches Manufactured and Sold in a Foreign State, 16 U. of Detroit L.J. 136 (1953).

¹⁵² Sen. 2540, 83d Cong., 1st Sess. (1953) is a revision of Sen. 1957, 82d Cong., 2d Sess. (1952), the original Wiley Bill, which was introduced last year but on which no hearings were held.

¹⁵³ Pub. L. No. 201, 83d Cong., 1st Sess., c. 334 (Aug. 5, 1953), 67 Stat. 389 (1953). The pharmaceutical industry was busily engaged during the past year—and finally succeeded—in seeking complete revision of the program of the World Health Organization's Expert Committee on the Selection of International Nonproprietary Names. See with regard to this program and its fate Horan, A W.H.O. International Pharmacopoeia, address before the Food, Drug, and Cosmetic Law Division, Am. Bar Ass'n, Aug. 26, 1953, soon to be published in the Food, Drug and Cosmetic Law Journal; Levy, WHO Authorized It?, 43 T.M. Rep. 229 (1953); Miller, International Non-Proprietary Names, 43 T.M. Rep. 133 (1953).

¹⁵⁴ 1-2 Eliz. II, c. 49, assented to May 14, 1953. See with regard to the new law Osborne, The New Canadian Trade-Marks Act, 43 T.M. Rep. 546 (1953).

The new Canadian Act has incorporated some of the more modern features of our own Act of 1946 and—most importantly—for the first time liberalizes the hitherto harsh and inflexible rules with regard to the assignment and licensing of trade-marks in Canada.¹⁵⁵

There has been considerable activity during 1953 with regard to state trade-mark legislation. The only state, however, which actually passed a new registration statute was Kansas.¹⁵⁶ In New York, two bills, completely revising the outmoded present registration provisions as embodied in the General Business Law of the state,¹⁵⁷ simultaneously passed the Legislature but were vetoed by Governor Dewey in April 1953,¹⁵⁸ on the ground that the sponsors of the two bills should make a joint effort to present a new statute

¹⁵⁵ Mention may also be made of an important amendment to the Philippine trade-mark law. House Bill No. 2765, which became effective in June 1953, Republic Act No. 865, for the first time enables foreign applicants to secure trade-mark registrations in the Philippine Islands upon proof of reciprocity by the applicant's home country. While applications in the name of United States citizens had been accepted and acted upon by the Philippine Patent Office even before the enactment of this law, this had not been true of applicants residing in other countries, such as France, Great Britain, Italy, Switzerland, and others. It should be noted, however, that no trade-mark application will be granted under the new Philippine Act unless the trade-mark, trade name or service mark has been in actual use in commerce with the Philippines for a minimum period of two months before the filing date of the application. This limitation applies to United States applicants as well as other foreign applicants.

Of considerable importance in connection with international trade-mark protection is the much-publicized decision of the Appellate Court of Paris, March 14, 1953, in *Omega Co., Louis Brandt et frère v. Omega Co. of Paris*, published in German in *La Propriété Industrielle* (June 1953) and, because of its special importance, also translated into English at p. 92. In that case, the French court held for the first time (overruling a previous practice of long standing) that a foreign applicant for registration of a trade-mark in France no longer need attach a certificate of registration in the home country to the application, so that the French application is now treated entirely independently from the country of origin. It is understood, however, that an appeal has been taken from this decision to the *Cour de Cassation*, the highest French court, which will probably not hand down a decision before some time in 1955. In the meantime, Denmark, by royal decree dated September 17, 1953, and published October 3, 1953, has also waived the requirement of home registration in the cases of applicants in countries which do not require the submission of such certificates from Danish applicants. Most recently, Sweden has also adopted the same practice.

¹⁵⁶ House Bill No. 475, eff. July 1953.

¹⁵⁷ N.Y. Gen. Bus. Law § 367.

¹⁵⁸ Sen. Bill. No. 416, introduced by Bennett January 19, 1953, and Sen. Bill No. 917, introduced by Mitchell January 28, 1953. In his veto message of April 17, 1953, the Governor said: "These Bills represent a constructive effort to recodify the New York Law of trade-marks. Two of the Bills are sponsored by the Joint Legislative Committee on Interstate Cooperation on the recommendation of the National Association of Secretaries of State and The United States Trade-Mark Association. While the provisions of both proposals conform in most respects, they vary in significant details. Each contains sufficient commendable features to warrant disapproval of the measures at this time so that the sponsors may jointly work out an agreed bill incorporating the best features of both proposals for introduction at the next session of the Legislature."

harmonizing the differences found in the two bills submitted to him for signature.

B. Administrative and Judicial Developments

*Registrability: Trade-Marks and Trade Names.*¹⁵⁹—While no further court decisions have been rendered with regard to this distinction since the *Duncan Electric*¹⁶⁰ case, the Patent Office has continued its practice of rejecting names which, in its opinion, are merely trade names. On that ground, the notation "Gilbert Hall of Science"¹⁶¹ and the notation "The Yankee Network, Inc."¹⁶² followed by a street address and location, were held unregistrable.

Advertising Slogans.—Notwithstanding the fact that one district court had held the slogan "The Fate of a Fabric Hangs By a Thread" registrable as part of a composite trade-mark,¹⁶³ the Patent Office has readopted a justifiably conservative approach toward registrability of slogans on the principal register. A typical slogan case was *Ex parte Robert Hall Clothes, Inc.*,¹⁶⁴ in which the applicant sought to register the slogan "Why Pay For Overhead When You Can't Wear It?" This was held to be unregistrable on the principal register, the Commission emphasizing that slogans were referred to in the statute only in connection with the supplemental register and in connection with service marks. Those slogans which do not even reflect a minimum degree of potential distinctiveness were held unregistrable even on the supplemental register. For that reason, "The Cigar Supreme" was rejected,¹⁶⁵ as was the slogan "America's Most Luxurious Matress."¹⁶⁶ The words "Definite Feeds For Definite Needs,"¹⁶⁷ on the other hand, were held to be catchy and rhythmic enough to satisfy the requirements for registration on the supplemental register.

Surnames.—Since the court of appeals decision of last year,¹⁶⁸ holding the trade-mark "Kimberly-Clark" to be a combination of two surnames, registrable only with a claim of distinctiveness under

¹⁵⁹ The Commissioner of Patents has just announced that the recordation of certificates of incorporation, which had been in effect under the now repealed Trade-Mark Act of 1905, has been discontinued. 99 U.S.P.Q. No. 3, p. 111 (Oct. 19, 1953).

¹⁶⁰ *Duncan Electric Mfg. Co. v. Marzall*, 95 U.S.P.Q. 242 (D.D.C. 1952); 1952 Annual Surv. Am. L. 310, 28 N.Y.U.L. Rev. 341 (1953).

¹⁶¹ *Ex parte A. C. Gilbert Co.*, 96 U.S.P.Q. 192 (Pat. Off. Ex. Ch. 1953).

¹⁶² *Ex parte The Yankee Network, Inc.*, 96 U.S.P.Q. 218 (Pat. Off. Ex. Ch. 1953).

¹⁶³ *Ex parte American Enka Corp.*, 92 U.S.P.Q. 111 (D.D.C. 1952), reversing 81 U.S.P.Q. 476 (Comm'r Pat. 1949). See 1952 Annual Surv. Am. L. 310, 28 N.Y.U.L. Rev. 341 (1953).

¹⁶⁴ 97 U.S.P.Q. 462 (Pat. Off. Ex. Ch. 1953).

¹⁶⁵ *Ex parte I. Lewis Cigar Mfg. Co.*, 95 U.S.P.Q. 225 (Pat. Off. Ex. Ch. 1952).

¹⁶⁶ *Ex parte Englander Co.*, 97 U.S.P.Q. 468 (Pat. Off. Ex. Ch. 1953).

¹⁶⁷ *Ex parte Central Soya Co.*, 95 U.S.P.Q. 343 (Pat. Off. Ex. Ch. 1952).

¹⁶⁸ *Kimberly-Clark Corp. v. Marzall*, 93 U.S.P.Q. 191 (D.C. Cir. 1952).

Section 2(f), the same court had occasion to pass on the registrability of the name "J C Higgins"¹⁶⁹ in an R.S. 4915 proceeding. It now held that "J C Higgins," while not merely a surname, was "primarily merely" a surname and, therefore, not registrable except under Section 2(f) of the Act of 1946. The Court of Customs and Patent Appeals, in affirming the Office's refusal to register the notation "S. Seidenberg & Co.'s" in the absence of a showing of distinctiveness under Section 2(f), likewise came to the conclusion that this notation was "primarily merely a surname."¹⁷⁰ It is interesting to note, however, that this court expressed doubt about the correctness of the present Patent Office practice under which, since the *Andre Dallieux* decision,¹⁷¹ a combination of a person's Christian name and surname is held registrable as not being "primarily merely a surname."

Descriptiveness.—Contrary to the *Kimberly-Clark* decision by the Court of Appeals for the District of Columbia, the Court of Customs and Patent Appeals recently handed down a decision which, in effect, overruled its own prior decision in the *Midy Laboratories* case,¹⁷² and in which a contraction of three descriptive terms into one word had been held descriptive despite such contraction. In its most recent decision,¹⁷³ the court held that the notation "Startgrolay" was registrable since the applicant had so combined three words into a unitary notation as to result in an entirely new word.

Secondary Meaning and Distinctiveness (Section 2[f]).—The *Burgess Battery* case,¹⁷⁴ involving the registrability of the well-known stripe design on the plaintiff's batteries, has been decided by the Court of Appeals for the District of Columbia against the applicant. Thus, this design, which had been held unregistrable under the Act of 1905,¹⁷⁵ was again refused registration even under Section 2(f) of the new statute on the ground that the design constituted the entire ornamental background of the article and did not function as a trade-

¹⁶⁹ *Sears, Roebuck & Co. v. Watson*, 96 U.S.P.Q. 360 (D.C. Cir. 1953).

¹⁷⁰ *In re I. Lewis Cigar Mfg. Co.*, 98 U.S.P.Q. 265 (C.C.P.A. 1953).

¹⁷¹ *Ex parte Andre Julien Dallieux*, 83 U.S.P.Q. 262 (Comm'r Pat. 1949); see Derenberg, *The Fifth Year of Administration of the Lanham Trade-Mark Act of 1946*, 94 U.S.P.Q. No. 8, pt. II, p. 10, reprinted in 42 T.M. Rep. 712 (1952); Derenberg, *The Sixth Year of Administration of the Lanham Trade-Mark Act of 1946*, 98 U.S.P.Q. No. 8, pt. II, p. 4, reprinted in 43 T.M. Rep. 779 (1953). In her recent ruling in *Carafol-Silverman Co. v. Julette Originals*, 99 U.S.P.Q. 142 (Comm'r Pat. 1953), Commissioner Leeds also expressed the view that, contrary to the *Andre Dallieux* decision, the name "Paula Dean Originals" should not be held registrable without reliance on Section 2(f) of the Act on the ground that it was primarily merely a surname.

¹⁷² *In re Midy Laboratories*, 104 F.2d 617 (C.C.P.A. 1939).

¹⁷³ *In re Ada Milling Company*, 98 U.S.P.Q. (C.C.P.A. 1953).

¹⁷⁴ *Burgess Battery Co. v. Watson*, 204 F.2d 35 (D.C. Cir. 1953).

¹⁷⁵ *In re Burgess Battery Co.*, 112 F.2d 820 (C.C.P.A. 1940).

mark.¹⁷⁶ Therefore, it is still the law that configurations, packages and the like are at most registrable on the supplemental register as capable of distinguishing, but may not be registered under Section 2(f) since they are not considered technical trade-marks. It was expressly so held by the Commissioner in the *Scotch Tape* case¹⁷⁷ involving the sleigh-shaped device.

There have been numerous cases in which applications for registration under Section 2(f) were denied on the ground that the word sought to be registered was incapable of trade-mark distinctiveness. Thus, the Court of Customs and Patent Appeals, in the first case reaching it involving this question, held the notation "Carilionic Bells" to be incapable of distinctiveness for "Electrically Operated Carillons or Chimes."¹⁷⁸ Similarly, the word "Butter-Nut"¹⁷⁹ was held unregistrable and in a case involving the word "Rubbercote" for floor enamel,¹⁸⁰ it was pointed out that the burden of proving distinctiveness of so descriptive a term was a "very heavy" one and very difficult to discharge. The word "Prefab" was held to be not only highly descriptive but actually generic as applied to certain shelving material.¹⁸¹ One of the most interesting cases involving this point and reaching the Court of Appeals for the District of Columbia concerned the registrability under Section 2(f) of the notation "Cube Steak."¹⁸² In that case, applicant had registered this term under the Act of 1920 but claimed that it had acquired distinctiveness as a result of strictly controlled licensing on plaintiff's part of the right to use the term on meat processing machines on which applicant owned the patents. The Patent Office tribunals, the district court and the court of appeals all reached the conclusion that, despite plaintiff's "great efforts," the word had lost its original meaning and had become a generic term. The court of appeals indicated, however, that if it were true that customers for applicant's machines still regarded the mark as pointing

¹⁷⁶ *Burgess Battery Co. v. Marzall*, 101 F.Supp. 812 (D.D.C. 1952). See 1952 Annual Surv. Am. L. 311, 28 N.Y.U.L. Rev. 342 (1953).

¹⁷⁷ *Ex parte Minnesota Mining & Mfg. Co.*, 92 U.S.P.Q. 74 (Pat. Off. Ex. Ch. 1952). See 1952 Annual Surv. Am. L. 311-12, 28 N.Y.U.L. Rev. 342-43 (1953).

¹⁷⁸ *Schulmerich Electronics, Inc. v. J. C. Deagan, Inc.*, 202 F.2d 772 (C.C.P.A. 1953). Assistant Commissioner Leeds, in her first decision involving this point, held the notation "Crippled Shad" unregistrable under Section 2(f) on the ground that to grant such a registration would deprive others of the right to use the word "crippled" in connection with a function or feature of a lure for fish. *Ex parte True Temper Corp.*, 98 U.S.P.Q. 412 (Comm'r Pat. 1953).

¹⁷⁹ *Ex parte Hollywood Brands, Inc.*, 94 U.S.P.Q. 418 (Pat. Off. Ex. Ch. 1952).

¹⁸⁰ *Ex parte Wilbur & Williams Co.*, 98 U.S.P.Q. 36 (Pat. Off. Ex. Ch. 1953).

¹⁸¹ *Ex parte Bankers Box Co.*, 96 U.S.P.Q. 266 (Pat. Off. Ex. Ch. 1953).

¹⁸² *Spang v. Watson*, 97 U.S.P.Q. 290 (D.C. Cir. 1953), appeal from 93 U.S.P.Q. 61 (D.D.C. 1952).

distinctly to applicant as the producer, "perhaps a limited registration [under Section 2(f)] might be possible."

Service Marks.—The Court of Customs and Patent Appeals had its first opportunity to pass upon the requirements of a valid service mark in *Ex parte Radio Corporation of America*.¹⁸³ The applicant sought to register the slogan "The Music You Want When You Want It" as a service mark but the application was rejected primarily on the ground that the slogan was used in the advertising or sale of goods (phonograph records) rather than in the advertising or sale of services. In affirming the ruling of the Patent Office, the Court of Customs and Patent Appeals said:

We believe it equally true that Congress intended a service mark to function in such a fashion as to identify and distinguish those things of an intangible nature, such as services, in contradistinction to the protection already provided for the marks affixed to those things of a tangible nature such as goods and products. Clearly had Congress intended service marks to apply to goods or products, we believe it would have so stated.¹⁸⁴

It was thus held that the program and its name were only "incidental" to the sale of the applicant's records. Shortly before this case, the Commissioner refused registration to the words "Ma Perkins" as a service mark for entertainment services on the same ground.¹⁸⁵

The Patent Office has continued to apply a rather restrictive

¹⁸³ 98 U.S.P.Q. 157 (C.C.P.A. 1953), affirming *Ex parte Radio Corp. of America*, 93 U.S.P.Q. 106 (Comm'r Pat. 1952), and 92 U.S.P.Q. 247 (Comm'r Pat. 1952). See 1952 Annual Surv. Am. L. 313, 28 N.Y.U.L. Rev. 344 (1953).

¹⁸⁴ 98 U.S.P.Q. 157, 158 (C.C.P.A. 1953).

¹⁸⁵ *Ex parte Procter & Gamble Co.*, 97 U.S.P.Q. 78 (Pat. Off. Ex. Ch. 1953). There are still some indications that under the administration of newly appointed Assistant Commissioner in Charge of Trade-Marks Leeds, a more liberal policy may be adopted in this respect. Thus, in *Ex parte Handmacher-Vogel, Inc.*, 98 U.S.P.Q. 413, the Commissioner permitted registration as a service mark of the word "Weathervane" superimposed upon a representation of a weathervane and enclosed within a circle formed of the words "Women's Open Golf Tournament," for the service of "conducting golf tournaments" in class 107 (Education and Entertainment). The Commissioner held that here the trade-mark was not used primarily as an incident to the sale of merchandise. She said: "A mark used by a person on or in connection with services normally expected of him and rendered merely as an accessory to and solely in furtherance of the sale, offering for sale, or distribution of his goods is not a service mark within the purview of the Act; but a manufacturer, seller or distributor of goods who supplies a bona fide service or services over and above those normally expected and only incidentally related to the furtherance of such manufacture, sale or distribution is entitled to have the registrability of his mark judged by the standards ordinarily applied in determining registrability—whether the mark used to identify the service is the same as or different from that used to identify the goods." *Id.* at 415. Similarly, it was held in *Ex parte Pure Oil Co.*, 99 U.S.P.Q. 19 (Comm'r Pat. 1953), that the slogan "Be Sure With Pure" was registrable as a service mark. The slogan was held to be not merely descriptive but actually to identify and distinguish the services of the applicant and not merely incidental to the sale of its products.

interpretation with regard to the definition of "use in commerce" in connection with service marks. Since Section 45 seems to require that the services themselves must be rendered in commerce, it was ruled that the name "Ritz Plaza" could not be registered as a service mark for a single hotel located in Miami Beach, Florida, and that, similarly, the notation "40 Winks Motel and Restaurant" was not registrable for motel services on the ground of lack of interstate commerce.¹⁸⁶

Problems in Inter Partes Proceedings: Likelihood of Confusion.

(a) *Opposition Proceedings.*—There has been a notable trend during the past two years in the Court of Customs and Patent Appeals to favor applicants rather than opposers in determining the issue of likelihood of confusion, although the rule still prevails that any doubt will be resolved against the newcomer, *i.e.*, the applicant. But while formerly any similarity in sound, appearance or meaning was usually sufficient to swing the scale against the applicant for registration, there have now been several cases in which the majority of the court indicated that dissimilarity in one or two of these respects may outweigh similarities in the third. Thus, while the court in an earlier case had held the trade-mark "Seasonaire," as applied to ladies' coats and suits, confusingly similar to opposer's "Season Skipper," as used on men's, boys' and girls' overcoats,¹⁸⁷ the court more recently overruled its previous decision¹⁸⁸ on the ground that it was no longer persuaded that there was a likelihood of confusion between these two marks as used. Similarly, the word "Favora" for a soup mix was held not to be confusingly similar to "Flavorite" for an almost identical product, primarily because of the entirely different meaning of these two terms.¹⁸⁹ "Sheerazair" was held not to be conflicting with "Scheherazade," as used on women's hosiery, on the same ground.¹⁹⁰ This "fundamental change in the prevailing philosophy of the majority of the court," as Judge O'Connell calls it in his dissenting opinion in the last-mentioned case, led him to make the following observation:

Members of the bar and of various legal and trade associations are not unaware of the fact that due to a fundamental change in the prevailing philosophy of the majority, this court, in general, has now reversed its former position with respect to similar or identical trade-marks the use of which by the newcomer has been challenged as deceptive and

¹⁸⁶ *Ex parte Atlantic Management Co.*, 94 U.S.P.Q. 417 (Pat. Off. Ex. Ch. 1952).

¹⁸⁷ *C. B. Shane Corp. v. Desmond's*, 139 F.2d 502 (C.C.P.A. 1943).

¹⁸⁸ *Merritt-Taylor, Inc. v. C. B. Shane Corp.*, 195 F.2d 535 (C.C.P.A. 1952).

¹⁸⁹ *Continental Coffee Co. v. Continental Foods, Inc.*, 202 F.2d 759 (C.C.P.A. 1953), affirming 91 U.S.P.Q. 271 (Comm'r Pat. 1951).

¹⁹⁰ *Irma Hosiery Co. v. Schulman*, 201 F.2d 891 (C.C.P.A. 1953), reversing 90 U.S.P.Q. 40 (Comm'r Pat. 1951).

misleading for the purpose of trading on the good will built up at great expense by the owner of the original mark in issue.¹⁹¹

In the numerous conflicting opinions involving the various "O-Matic" trade-marks,¹⁹² a climax was reached in the most recent case, in which a majority of the court held the word "Pow-R-Matic" to be unlikely to cause confusion with "Oil-O-Matic."¹⁹³ With regard to this change of approach, Judge O'Connell, in his dissenting opinion, quotes the following from the appellant's brief:

While the Lanham Act was heralded as offering trademark owners unprecedented protection, an analysis of cases decided by this Court shows that in the approximately five and one-half years before the Lanham Act became effective, this Court sustained 48 out of 66 oppositions—over 70%—involving issues of similarity of the marks or similarity of the class of goods, whereas in the approximately five and one-half years since the Act became effective, this Court has dismissed 38 out of 57 oppositions involving such issues—about 66% of such cases.¹⁹⁴

The present majority rule thus appears to be that similarity in appearance or sound may be overcome by a showing of considerable dissimilarity in meaning, or that any two of these factors may be outweighed by the third.

(b) *Cancellation Proceedings.*—The new liberal trend is even more noteworthy as applied to cancellation proceedings. The Court of Customs and Patent Appeals has now clearly recognized that any doubt in such proceedings should be resolved against the petitioner rather than against the registrant on the ground that, contrary to opposition proceedings, the registrant may have acquired valuable vested rights in the registration long before the petition for cancellation may have been filed. Realizing this difference, the court pointed out in the *Myers* case:¹⁹⁵

In a cancellation proceeding, the situation is quite different. The defendant in such proceeding is one who had obtained substantial rights from the Government upon or about which he may have built a large and, of course, legitimate business. The cancellation of one's trade-mark may prove destructive to the business built about it. Surely,

¹⁹¹ 201 F.2d 891, 894 (C.C.P.A. 1953).

¹⁹² These were discussed in detail in Derenberg, *The Sixth Year of Administration of the Lanham Trade-Mark Act of 1946*, 98 U.S.P.Q. No. 8, pt. II, at 14, reprinted in 43 T.M. Rep. 779, 806 (1953).

¹⁹³ *Eureka Williams Corp. v. McCorquodale*, 98 U.S.P.Q. 138 (C.C.P.A. 1953), affirming 89 U.S.P.Q. 335 (Pat. Off. Ex. Ch. 1951).

¹⁹⁴ 98 U.S.P.Q. 138, 142 (C.C.P.A. 1953).

¹⁹⁵ *Application of Myers*, 201 F.2d 379 (C.C.P.A. 1953), reversing 90 U.S.P.Q. 118 (Pat. Off. Ex. Ch. 1951). *Commissioner Leeds in B. A. Ralston Co. v. American Sugar Refining Co.*, 99 U.S.P.Q. 141 (Comm'r Pat. 1953) has just expressed the same view.

no registration should be cancelled hastily and without a most careful study of all the facts.¹⁹⁶

Equitable Defenses: the Defense of Laches. (a) *Cancellation Proceedings.*—The decision by the Court of Customs and Patent Appeals in the *Graphol* case,¹⁹⁷ to which reference has been made in previous *Surveys*, has not had the far-reaching effect which had been originally expected. On the contrary, the defense of laches has been rejected in practically all cancellation proceedings in which the respondent sought to rely thereon. The Patent Office tribunals and the Court of Customs and Patent Appeals in the *Lightnin* case,¹⁹⁸ have read a modification into the rule of the *Graphol* case to the effect that laches can be relied on only where the respondent had built up a considerable business and good will during the period before the filing of the petition for cancellation. It was expressly so held by the Commissioner in the *Golden Oak* case¹⁹⁹ and in the *Park Lane* case.²⁰⁰ In the latter, the Commissioner found no evidence to establish that the registrant "would be in a worse position now than if cancellation proceedings were earlier instituted, i.e., by a showing of increased sales, profits, investments, etc.," and for that reason rejected the respondent's defense of laches. In its most recent decision on the point, the Court of Customs and Patent Appeals has affirmatively approved the Commissioner's point of view.²⁰¹

(b) *Opposition Proceedings.*—It now seems well established, at least as far as the Patent Office tribunals are concerned, that there is no room for the defense of laches in opposition proceedings.²⁰² This was most clearly spelled out in the recent *Locatelli* case,²⁰³ where the examiner-in-chief said:

¹⁹⁶ 201 F.2d 379, 383-84 (C.C.P.A. 1953). With regard to the equally wide difference of opinion prevailing among the various federal courts in determining likelihood of confusion in proceedings brought under Rev. Stat. § 4915 (1875), as amended, 35 U.S.C. § 63 (1946), see *Miles Shoes, Inc. v. R. H. Macy & Co.*, 199 F.2d 602 (2d Cir. 1952), cert. denied, 345 U.S. 909 (1953); *Frito Co. v. General Mills, Inc.*, 202 F.2d 936 (5th Cir.), cert. denied, 74 Sup. Ct. 47 (1953).

¹⁹⁷ *Willson v. Graphol Products Co.*, 188 F.2d 498 (C.C.P.A. 1951). See *Derenberg*, supra note 192, at 17, reprinted in 43 T.M. Rep. 779, 812 (1953); also Note, *Estoppel by Laches in Cancellation Proceedings*, 21 Geo. Wash. L. Rev. 512 (1953).

¹⁹⁸ *Lightnin Chemical Co. v. Royal Home Products, Inc.*, 197 F.2d 668 (C.C.P.A. 1952).

¹⁹⁹ *Continental Distilling Corp. v. Bohemian Distributing Co.*, 95 U.S.P.Q. 160 (Pat. Off. Ex. Ch. 1952).

²⁰⁰ *Bond Stores, Inc. v. May Department Stores Co.*, 96 U.S.P.Q. 57 (Pat. Off. Ex. Ch. 1953).

²⁰¹ *Sprayed Insulation, Inc. v. Sprayo-Flake Co.*, 96 U.S.P.Q. 152 (1952).

²⁰² See *General Motors Corp. v. United States Air Conditioning Corp.*, 92 U.S.P.Q. 257 (Pat. Off. Ex. Ch. 1952); *Northam Warren Corp. v. Millers Forge Mfg. Corp.*, 92 U.S.P.Q. 360 (Comm'r Pat. 1952).

... since the opposer could take no action as to the applicant's right to register the mark until after applicant had applied for registration and after the publication thereof, as provided by Section 13 of the Trade Mark Act of 1946 (and similar provisions in the prior act) the defenses of laches and acquiescence are deemed not to be applicable herein. Applicant waited over twenty years in seeking a Federal trade mark registration and can hardly be heard to complain that the opposer waited an equal period to object to such a trade mark registration. Moreover, if it be assumed that applicant could successfully raise the equitable defense of laches and acquiescence in a suit for trade mark infringement, it would not necessarily follow that applicant would be entitled to a Federal trade mark registration which is based on or recognizes the exclusive right to use the mark throughout the entire United States and the right to prevent others from registering or using the same or a similar mark on the same or related goods.²⁰⁴

Trade-Mark Infringement and Unfair Competition.—Recent trade-mark infringement cases do not permit the conclusion that under the Trade-Mark Act of 1946 more effective relief against infringement will be available. Not only do the various circuit courts of appeals apply different standards in determining infringement but frequently, and particularly in the second and ninth circuits, the outcome of an infringement suit will depend upon the particular panel of the court which happens to hear the case.²⁰⁵ Thus, Judge Clark, in his dissenting opinion in the *Hyde Park* case, in which the Supreme Court has just denied certiorari,²⁰⁶ stated:

Plaintiff-appellant has had the misfortune—so it seems to me—to come before a panel of this court allergic to the doctrine historically associated with us because of its nurture by our most illustrious judges of protecting trade names against competition which will create confusion as to the source of goods sold under such names. The chance of the assignment calendar which has so operated against plaintiff might as easily have brought it success, to judge by the three most recent cases on this issue before us, the unanimous decision in each instance—two in fact reversing decisions below—of another panel.²⁰⁷

²⁰³ *Locatelli, Inc. v. Locatelli Packing Co.*, 97 U.S.P.Q. 305 (Pat. Off. Ex. Ch. 1953).

²⁰⁴ *Id.* at 307.

²⁰⁵ The courts refused to find trade-mark infringement in the following cases: *Nebraska Consol. Mills Co. v. Shawnee Milling Co.*, 198 F.2d 36 (10th Cir. 1952) ("Mother's Best" not infringed by "Mother's Pride" on identical goods); *Chappell v. Goltsman*, 197 F.2d 837 (5th Cir. 1952) ("Bama" for blackberry jams and related products not infringed by "Bama" for blackberry wines); *Douglas Laboratories Corp. v. Copper Tan, Inc.*, 108 F.Supp. 837 (S.D.N.Y. 1952) ("Coppertone" on a sun tan preparation not infringed by "Copper Tan" on identical goods); *Consolidated Cosmetics v. Neilson Chemical Co.*, 109 F.Supp. 300 (E.D. Mich. 1952) ("Tabu" and "Taboo" for cosmetics not infringed by "Rustaboo" for a detergent).

²⁰⁶ *Hyde Park Clothes, Inc. v. Hyde Park Fashions, Inc.*, 204 F.2d 223 (2d Cir.), affirming 93 U.S.P.Q. 250 (S.D.N.Y. 1952), cert. denied, 74 Sup. Ct. 46 (1953).

²⁰⁷ 204 F.2d 223, 226 (2d Cir. 1953).

In that case, the majority of the court failed to find infringement or unfair competition by defendant's use of the words "Hyde Park" on women's wear, as against plaintiff's use of its identical registered trade-mark for men's wear. Significantly, the plaintiff in the *Hyde Park* case had so little confidence in the effect of its federal registration that it urged the court to apply the New York State law of unfair competition rather than the Federal Trade-Mark Act of 1946. A different panel of the same court had previously held the trade-mark "Gro Shoe" to be confusingly similar to "Gropals"²⁰⁸ and had likewise held the word "Speed,"²⁰⁹ as part of a composite mark, to be confusingly similar to "Speed Nut" and "Speed Clip" as used on similar goods.²¹⁰

On the other hand, there have been a few cases in which effective relief was granted against infringement and unfair competition. Outstanding among these is the recent decision by the usually conservative Court of Appeals for the Seventh Circuit in the *Stronghold* case,²¹¹ in which the owner of the registered trade-mark "Stronghold" for nails was given relief against a defendant using the identical word in a different design for screw products. In the course of its decision, the court indicated that even in Illinois the law of unfair competition was no longer restricted to cases of actual palming off.

Service Mark Infringement.—In what appears to be a case of first impression,²¹² a California district court was asked to enjoin the use by an insurance company of a picture of a "covered wagon" as an infringement of plaintiff's service mark of a picture of a similar covered wagon used as a symbol to identify its services. In a comprehensive opinion, Judge Goodman came to the conclusion that, despite the service mark registration, the plaintiff's alleged mark did not function to indicate services but was only an ornamental feature used by the plaintiff as an embellishment. He said:

²⁰⁸ *Miles Shoes, Inc. v. R. H. Macy & Co.*, 199 F.2d 602 (2d Cir. 1952), cert. denied, 345 U.S. 909 (1953).

²⁰⁹ *Speed Products Co. v. Tinnerman Products, Inc.*, 179 F.2d 778 (2d Cir. 1949).

²¹⁰ In the ninth circuit a similar split of opinion exists even between members of the same court. Compare, e.g., *Safeway Stores, Inc. v. Dunnell*, 172 F.2d 649 (9th Cir. 1949) with *Sunbeam Lighting Co. v. Sunbeam Corp.*, 183 F.2d 969 (9th Cir.), cert. denied, 340 U.S. 920 (1950). See also *Lunsford, Trade-Mark Infringement and Confusion of Source: Need for Supreme Court Action*, 35 Va. L. Rev. 214 (1949).

²¹¹ *The Independent Nail & Packing Co. v. Stronghold Screw Products, Inc.*, 205 F.2d 921 (7th Cir.), cert. denied, 74 Sup. Ct. 138 (1953). Other noteworthy cases granting relief are *Admiral Corp. v. Penco, Inc.*, 203 F.2d 517 (2d Cir. 1953), affirming 106 F.Supp. 1015 (W.D.N.Y. 1952); *Singer Mfg. Co. v. Redlich*, 109 F.Supp. 623 (S.D. Cal. 1952); *Q-Tips, Inc. v. Johnson & Johnson*, 206 F.2d 144 (3d Cir.), cert. denied, 74 Sup. Ct. 106 (1953).

²¹² *Springfield Fire & Marine Insurance Co. v. Founder's Fire & Marine Insurance Co.*, 99 U.S.P.Q. 38 (N.D. Cal. 1953).

This case, despite the interesting legal problem it has presented, really is "Much Ado About Nothing". The pleasure and pride of the plaintiff in the use of the ornamental picture of the covered wagon is understandable. But that is, per se, a far cry to granting judicial aid to stop another insurance company from using similar adornments or ornaments. In the absence of any evidence showing any confusion or likelihood of confusion, there is no need or cause for the drastic sanction of injunctive relief.²¹³

If this reasoning were affirmed by the appellate court, it would cast considerable doubt on the validity or, at least, the enforceability of the great majority of similar service marks which have thus far been registered by the Patent Office.

*The "Federal Law of Unfair Competition."*²¹⁴—The *Stauffer* doctrine,²¹⁵ in its procedural aspects, was reaffirmed by the Court of Appeals for the Ninth Circuit, which had first established it in the *Pagliero* case.²¹⁶ Once more the court held that, for jurisdictional purposes, the Trade-Mark Act of 1946 had established a new federal law of unfair competition in Section 44, which would confer upon the federal courts jurisdiction even in cases involving infringement of unregistered trade-marks or trade names in the absence of diversity of citizenship, provided only that the defendant was engaged in an interstate activity. Several federal district courts, particularly in the New York area, had refused to follow this doctrine as being in conflict with Section 1338 of Title 28 of the United States Code.²¹⁷ In two of these cases, the New York district courts reserved decision of this question until the Court of Appeals for the Second Circuit had passed on it. That the latter court did—rather unexpectedly—in the recent case of *American Automobile Ass'n v. Spiegel*.²¹⁸ Having found that the plaintiff had failed to allege a cause of action for infringement of its registered trade-mark under the Act of 1946, the court took occasion to discuss the soundness and applicability of the *Stauffer* doctrine with regard to the remaining jurisdictional issues of the case. Judge Learned Hand summarized the court's conclusion as follows:

We are forced to the conclusion that the Act does not give jurisdiction to the district courts over an action brought by any plaintiff with whose interstate commerce the defendant has unfairly competed.²¹⁹

²¹³ *Id.* at 45.

²¹⁴ See Note, 66 Harv. L. Rev. 1094. See also note 151 *supra*.

²¹⁵ *Stauffer v. Exley*, 184 F.2d 962 (9th Cir. 1950). See also *Derenberg*, *supra* note 192, at 25 et seq.

²¹⁶ *Pagliero v. Wallace China Co.*, 198 F.2d 339 (9th Cir. 1952).

²¹⁷ *Ross Products, Inc. v. Newman*, 94 F.Supp. 566 (S.D.N.Y. 1950); *Ronson Art Metal Works, Inc. v. Gibson Lighter Mfg. Co.*, 108 F.Supp. 755 (S.D.N.Y. 1952); *Hosid Products, Inc. v. Masbach, Inc.*, 108 F.Supp. 753 (N.D.N.Y. 1952).

²¹⁸ 205 F.2d 771 (2d Cir. 1953).

²¹⁹ *Id.* at 775.

The case was remanded to the lower court for further proceedings in order to afford an opportunity to the plaintiff to prove a substantial claim under the trade-mark laws to which a count for unfair competition may be "pendent" under Section 1338 of the United States Code. The petition filed with the United States Supreme Court to review this question and to resolve the conflict now existing between the *Stauffer* decision and the court's recent ruling in the *American Automobile Association* case was recently denied.²²⁰

²²⁰ 74 Sup. Ct. 138 (1953).

LABOR RELATIONS LAW

SYLVESTER PETRO AND ROBERT F. KORETZ

THE PAST year was, with a few exceptions, more notable for the continuation of large trends than for the definitive decision. Anticipated amendments to the Taft-Hartley Act have not materialized, and on the whole the decisions of the courts fall somewhat short of last year's prediction of "the delicate weaving of legal doctrine."¹ There is still considerable confusion concerning the extent to which the National Labor Relations Act (NLRA)² pre-empts the labor law field so as to preclude state court jurisdiction in labor disputes involving employers subject to the NLRA. But this confusion may be dispelled by the United States Supreme Court's review of the *Garner* case,³ discussed below. A trend has developed in some state and federal courts to hold stranger picketing for recognition coercive under the NLRA and subject to injunctive relief, while at the same time tending to say, if not to hold, that the same kind of picketing is privileged free speech if it is found to be "organizational" or "publicity" in character. Of exceptional significance is Judge Fee's exhaustively documented and carefully reasoned decision in the *Montgomery Ward* case,⁴ holding carriers liable in damages for a collusive refusal to extend services to a strike-bound employer. Also important is the view of the seventh circuit that Section 8(b)(4)(A) of the NLRA does not distinguish between "primary" and "secondary" union action, but neither does it—and possibly it could not constitutionally—outlaw refusals to apply for work even though such refusals might be designed to impose a secondary boycott.⁵ And with respect to compulsory unionism, the United States courts of appeals have held in a number of instances that the NLRB is enforcing the proscriptions of the NLRA too literally.

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The sections entitled *Federal v. State Jurisdiction and Union Unfair Practices and Concerted Action* were written by Professor Petro, and the remaining sections by Professor Koretz.

¹ 1952 Annual Surv. Am. L. 237, 28 N.Y.U.L. Rev. 268 (1953).

² 61 Stat. 136 (1947), 29 U.S.C. §§ 151 et seq. (Supp. 1952).

³ *Garner v. Teamsters Union*, 94 A.2d 893, 23 CCH Lab. Cas. ¶ 67,396 (Pa. 1953). Subsequent to this writing, the United States Supreme Court affirmed the decision below. 74 Sup. Ct. 161 (1953).

⁴ *Montgomery Ward & Co. v. Northern Pacific Terminal Co.*, 23 CCH Lab. Cas. ¶ 67,713 (D. Ore. 1953).

⁵ *Joliet Contractors Ass'n v. NLRB*, 202 F.2d 606, 22 CCH Lab. Cas. ¶ 67,387 (7th Cir. 1953).

Developments in other divisions of the subject matter of labor law, such as the area of employer unfair labor practices, in the main reflect only elaboration of familiar principles. But even in these areas, an occasional holding warrants careful consideration, as, for example, the District of Columbia circuit's rejection in the *West Texas Utilities* case⁶ of the expansive construction given the Taft-Hartley amendments to the proviso in Section 9(a) of the NLRA by the second circuit a few years ago. And of considerable potential significance are the efforts of the federal district and circuit courts to define the nature of the contract cause of action created by Section 301 of the Taft-Hartley Act.

I

FEDERAL V. STATE JURISDICTION

Employers are still seeking and unions are still dodging the services of the state courts in labor disputes, and the law concerning the jurisdiction of the state courts in such disputes continues to be as uncertain this year as it has been in the past. Employers go to state courts for a simple reason—to get the immediate and effective relief against unlawful union conduct which is unavailable in the federal system. For precisely the same reason union counsel have availed themselves of all the old arguments and have invented a few new and ingenious ones in their efforts to avoid the application of state laws. The unions' principal contention, this year as in the past, is that national labor law has "pre-empted the field" of labor relations regulation, and that, therefore, there is no room for the application of state law, even though the latter may be perfectly consistent with federal law. Supplementing this "pre-emption" argument is the device—a device which may seem more than ordinarily cynical to some—of asking federal courts first to remove actions brought in state courts and then to dismiss them for want of jurisdiction. Most federal courts during the past year refused to participate in this game; and few courts, state or federal, have accepted the "pre-emption" position in its pure form. However, some state and federal courts are agreed that where both state and federal law regulate a given activity in the same way, resort may not be had to the state courts. Since it is not always easy to determine the precise rule under the NLRA (the NLRB and the courts sometimes disagree), it will be seen that one may not always be sure whether state law should be ousted—under this rule—as covering the same ground as federal law. But as we shall soon see, the Supreme Court now has an opportunity to clarify the situation.

Attempted Removals from State to Federal Courts.—A properly

⁶ *West Texas Utilities Co. v. NLRB*, 206 F.2d 442, 23 CCH Lab. Cas. ¶ 67,554 (D.C. Cir. 1953).

co-operative federal court can, such are the vagaries of our federal system, provide unions with a virtual immunity for unlawful conduct. This peculiar result is possible, and here the peculiar becomes the paradoxical, primarily because of the limited powers which Congress has seen fit to give the federal courts in labor disputes. On the one hand Congress has, in the Norris-LaGuardia Act,⁷ denied the federal courts power to issue injunctive relief in "labor disputes"; and, on the other, it has made abundantly clear to the federal courts that, with minor exceptions not relevant here, they may not enforce the proscriptions of the NLRA, at least in suits by private parties.⁸ Notwithstanding these factors, the United States Code contains a provision permitting the defendant in any state court proceeding to secure removal of the cause to the federal courts, where the matter involved is one over which the federal courts have original jurisdiction pursuant to a federal statute.⁹ Now a strike in violation of a collective agreement, or a secondary boycott, is unlawful in practically all the states, and violates the Taft-Hartley Act as well. There is this difference, however: as a general rule the state courts will enjoin such unlawful union action, whereas, owing to the factors sketched above, the federal courts will normally hold that they have no power to issue injunctive relief (except on suit by the NLRB), that their judicial powers are statutorily limited to the granting of relief solely in the form of damages. So if a petition for injunctive relief is filed in a state court by an employer for whom injunctive relief is the only real relief, removal of the action to a federal court amounts to a denial of the relief sought.

During 1953 unions had less success with this stratagem than they had in preceding years, although their efforts were not in all instances failures. In five cases in which employers had gone originally to state or territorial courts for injunctive relief against strikes in violation of collective agreements, union efforts to seek removal were rebuffed by the respective federal courts—those of California,¹⁰ Hawaii,¹¹ Missouri,¹² New York¹³ and Puerto Rico.¹⁴ Common in all of these

⁷ 47 Stat. 70 (1932), 29 U.S.C. §§ 101-15 (1946).

⁸ Cf. *Amazon Cotton Mill Co. v. Textile Workers Union*, 167 F.2d 183, 187, 14 CCH Lab. Cas. ¶ 64,230 (4th Cir. 1948).

⁹ 28 U.S.C. § 1441(a) (Supp. 1952).

¹⁰ *Associated Tel. Co. v. Communications Workers*, 114 F. Supp. 334, 24 CCH Lab. Cas. ¶ 67,774 (S.D. Cal. 1953).

¹¹ *Castle & Cooke Terminals, Ltd. v. Local 137 ILWU*, 110 F. Supp. 247, 23 CCH Lab. Cas. ¶ 67,419 (D. Hawaii 1953).

¹² *American Optical Co. v. Andert*, 108 F. Supp. 252, 22 CCH Lab. Cas. ¶ 67,328 (W.D. Mo. 1952).

¹³ *Haspel v. Bonnaz*, 112 F. Supp. 944, 23 CCH Lab. Cas. ¶ 67,675 (S.D.N.Y. 1953).

¹⁴ *Berrios v. Bull Insular Line, Inc.*, 109 F. Supp. 858, 23 CCH Lab. Cas. ¶ 67,443 (D. Puerto Rico 1953).

decisions was a perception of the anomaly hidden in the union's request for removal. Quoted more than once was District Judge Stewart's analysis: "... it seems anomalous to hold, on one hand, that a District Court has original jurisdiction sufficient to grant the removal of a cause and then to hold, on the other, that the case, once removed, must be dismissed by the District Court for the reason that it lacks jurisdiction of the cause and consequently has no power to grant the relief sought. This, in effect, is what the defendants ask us to do."¹⁵

Although these decisions were based primarily on the proposition that the federal courts lacked power to grant the injunctive relief sought,¹⁶ some mentioned other grounds worth noting here. Thus at least two of the federal district judges held that the Federal Government had not in the Taft-Hartley Act pre-empted the field of regulation of collective agreements.¹⁷ And Judge Carter, sitting in a California district court, thought that whatever the power of the federal courts in the premises, the plaintiff employer had a right to select his own law and his own forum in the first place.¹⁸

Perhaps the most titillating of all the union attempts to evade the sanctions of law—state or federal—is to be found in the argument addressed to the Ohio federal district court in the *Richman Brothers* case.¹⁹ That was a suit originally brought by the employer in an Ohio state court for injunctive relief against stranger picketing for recognition. In seeking removal to the federal district court, union counsel contended, contrary to *NLRB* precedents, that such picketing violates the NLRA; and, contrary to *all* precedents, that the federal district courts are generally empowered to issue injunctive relief against NLRA unfair labor practices. The court rejected both contentions and remanded the case to the state court.

The resurgent, expansive Teamsters Union—probably involved in more litigation during the past year than any other private organization in the United States—seems to have been the only union which succeeded in convincing a federal district court that it should take a case from a state court and then dismiss it for lack of jurisdiction. The employer had sought injunctive relief in the state court

¹⁵ *Walker v. United Mine Workers*, 105 F. Supp. 608, 611, 22 CCH Lab. Cas. ¶ 67,112 (W.D. Pa. 1952).

¹⁶ See also *Sandsberry v. Gulf, Colorado & Santa Fe Ry.*, 114 F. Supp. 834, 24 CCH Lab. Cas. ¶ 67,787 (N.D. Tex. 1953).

¹⁷ *Associated Tel. Co. v. Communications Workers*, 114 F. Supp. 334, 24 CCH Lab. Cas. ¶ 67,774 (S.D. Cal. 1953); *Castle & Cooke Terminals, Ltd. v. Local 137 ILWU*, 110 F. Supp. 247, 23 CCH Lab. Cas. ¶ 67,419 (D. Hawaii 1953).

¹⁸ *Associated Tel. Co. v. Communications Workers*, 114 F. Supp. 334, 24 CCH Lab. Cas. ¶ 69,774 (S.D. Cal. 1953).

¹⁹ *Richman Bros. Co. v. Amalgamated Clothing Workers*, 114 F. Supp. 185, 23 CCH Lab. Cas. ¶ 67,500 (N.D. Ohio 1953).

against a blockade imposed by the union with the co-operation of common carriers whose continued services were vital to the plaintiff employer's operations. According to the original complaint the union and the carriers were violating the state antitrust law, and the carriers were violating their common-law and statutory duties to provide services to all customers without discrimination. Federal District Judge Starr, in ordering removal of the case only to dismiss it,²⁰ held that the complaint alleged violations of the NLRA, although that statute was not mentioned; and, without citing a single Michigan authority, that the facts as alleged did not amount to a violation of the Michigan antitrust law.²¹ The judge held also that a common carrier's violation of a legal duty is of no significance where it occurs in a labor dispute.²² Although the reasoning of the opinion is forced at every step, it is nowhere more questionable than at the point at which the judge insists that the facts as stated in the original complaint added up to a violation of the NLRA. In the judge's own words, "... the acts charged against the defendant unions . . . and against the defendant common carriers . . . are, in fact, merely the refusals of the carriers' employees . . . to cross the picket lines established by the . . . Union . . . at the plaintiff's factory or its other places of business in South Haven, Michigan."²³ If this is an accurate description of the allegations, it is very doubtful that NLRA unfair practices could be found to exist.²⁴ And if that is true, then all basis for federal jurisdiction vanishes.

State Jurisdiction where State Law Consistent with NLRA.—As a theoretical matter there would seem to be no point in an employer's basing a petition for injunctive relief on state law when that law is substantially the same as federal law. Why go to the state courts? Why not use the federal remedies? The short answer is that the federal remedies are largely spurious. An employer can scarcely ever get an injunction from a federal court in an action instituted by himself; in the few instances in which injunctive relief is available at all, it is available only upon suit therefor by the NLRB. And in regard to most types of union action which amount to NLRA unfair

²⁰ S. E. Overton Co. v. IBT, 115 F. Supp. 764, 24 CCH Lab. Cas. ¶ 67,803 (W.D. Mich. 1953).

²¹ Compare Winkelman Bros. Apparel, Inc. v. IBT, 22 CCH Lab. Cas. ¶ 67,262 (Mich. Cir. Ct. 1952).

²² Compare the exhaustively documented and carefully reasoned opinion to the contrary in Montgomery Ward & Co. v. Northern Pacific Terminal Co., 23 CCH Lab. Cas. ¶ 67,713 (D. Ore. 1953), discussed herein at p. 376, *infra*.

²³ S. E. Overton Co. v. IBT, 115 F. Supp. 764, 769, 22 CCH Lab. Cas. ¶ 67,803 (W.D. Mich. 1953).

²⁴ Cf. NLRB v. International Rice Milling Co., 341 U.S. 665 (1951).

practices, the NLRB never seeks injunctive relief. In these circumstances, it is easy to understand why employers usually seek relief in the state courts; and it is equally easy to understand why unions have been insisting so vigorously that the NLRA has pre-empted the field of regulation of interstate labor relations.

No doctrinal question in labor relations law is more vexing, more complicated, more important, or more in need of clarification by high judicial or legislative authority than the present one. The courts are more or less agreed that state courts retain jurisdiction to control acts of violence in labor disputes, even in interstate situations, notwithstanding the fact that the NLRA prohibits such violence.²⁶ Furthermore, at least the state courts seem to be agreed that state control may be exerted where the business involved is "predominantly local" in character.²⁶ But all is confusion beyond these points. Some courts hold that state law, applied by state courts, may govern in interstate situations, so long as the state law is substantively consistent with federal law; other courts hold that the federal law pre-empt the field to the exclusion of state control; and still others take positions more or less ambiguous.

The United States Court of Appeals for the Ninth Circuit has taken a pre-emptionist position, although a specially concurring opinion in the decision in question suggests that the court is aware of the dangers in the position. In *Capital Service, Inc. v. NLRB*²⁷ the court held that where union conduct violates the NLRA, the employer may not avail himself of relief granted by a state court under consistent state law. But Circuit Judge Pope, concurring specially, noted that the case did not involve a situation in which the NLRB had exercised its power to decline jurisdiction at will—a power, be it noted, that the ninth circuit has confirmed. One of the most noteworthy features of the *Capital Service* decision is the court's holding that minority or stranger picketing for recognition amounts to union restraint or coercion in violation of the NLRA. The Board has itself held that such picketing does not violate the NLRA, and there is

²⁶ *Irving Subway Grating Co. v. Silverman*, 24 CCH Lab. Cas. ¶ 67,855 (N.Y. Sup. Ct. 1953); *Lodge Mfg. Co. v. Gilbert*, 260 S.W.2d 154, 23 CCH Lab. Cas. ¶ 67,737 (Tenn. 1953); *Ohio Valley Advertising Corp. v. Local 207, Sign Painters*, 76 S.E.2d 113, 23 CCH Lab. Cas. ¶ 67,652 (W. Va. 1953); *Russell v. International Union UAW*, 64 So.2d 384, 23 CCH Lab. Cas. ¶ 67,463 (Ala. 1953); *United Construction Workers, UMWA v. Laburnum Construction Corp.*, 75 S.E.2d 694, 23 CCH Lab. Cas. ¶ 67,542 (Va.), appeal pending, 22 U.S.L. Week 3054 (U.S. Sept. 8, 1953).

²⁶ *Universal Car & Service Co. v. IAM*, 24 CCH Lab. Cas. ¶ 67,813 (W.D. Mich. 1953); *Way Baking Co. v. Teamsters and Truck Drivers Local 164*, 56 N.W.2d 357, 22 CCH Lab. Cas. ¶ 67,318 (Mich.), cert. denied, 345 U.S. 957 (1953).

²⁷ 22 CCH Lab. Cas. ¶ 67,394 and 204 F.2d 848, 23 CCH Lab. Cas. ¶ 67,615 (9th Cir. 1953).

nothing to indicate that it intends to change its view. If the Board does in fact continue to insist that stranger picketing does *not* unlawfully restrain or coerce employees under the NLRA, the crucial premise of the ninth circuit's holding in *Capital Service* crumbles, and the negation of state court jurisdiction over such picketing becomes arbitrary. More important than that is the practical factor that, even if the NLRB should change its position and hold stranger picketing an unfair practice, employers will still not get from the NLRB the vitally needed immediate injunctive relief which the state courts afford.

The Pennsylvania Supreme Court has gone along with the ninth circuit, holding both that stranger picketing for recognition violates the NLRA and that, such being the case, the state courts, even while acting under consistent state law, must decline jurisdiction in deference to the NLRB.²⁸ It may be that the United States Supreme Court will tell us both whether stranger picketing for recognition violates the NLRA and whether the NLRA pre-empts the whole field of labor relations regulation. Some light may also be shed then on the odd positions which the Alabama Supreme Court has been taking—holding on the one hand in interstate cases that it can enforce NLRA sanctions²⁹ and on the other that it cannot even enforce Alabama sanctions where similar sanctions exist in the NLRA.³⁰

Judges in Michigan and Texas have refused to relinquish jurisdiction where their state laws were consistent with federal law. The Michigan judge, Judge Miller, noting that the only effective relief for the employer against the union's coercive picketing was immediate injunctive relief, thought that to require the employer to pursue the possibly illusory and certainly dilatory federal procedures would be to deny him due process of law.³¹ The Texas court found it impossible to understand why a state law which liberated rather than burdened interstate commerce should not be applied to enjoin union conduct which was certainly violative of state law, if not also of federal law.³²

An interesting Ohio decision refuses jurisdiction where the only charge is a violation of the NLRA, but implies that if the charge

²⁸ *Garner v. Teamsters Union*, 94 A.2d 893, 23 CCH Lab. Cas. ¶ 67,396 (Pa.), *aff'd*, 22 U.S.L. Week 4055 (U.S. Dec. 15, 1953).

²⁹ *Kinard Construction Co. v. Building Trades Council*, 64 So.2d 400, 23 CCH Lab. Cas. ¶ 67,467 (Ala. 1953); *Russell v. International Union UAW*, 64 So.2d 384, 23 CCH Lab. Cas. ¶ 67,463 (Ala. 1953).

³⁰ *Boggett Transportation Co. v. Local 261, United Wholesale and Warehouse Employees Union*, 65 So.2d 506, 23 CCH Lab. Cas. ¶ 67,598 (Ala. 1953).

³¹ *Winkelman Bros. Apparel, Inc. v. IBT Local 299*, 22 CCH Lab. Cas. ¶ 67,262 (Mich. Cir. Ct. 1952).

³² *Truck Drivers Local 941 v. Whitfield Transportation, Inc.*, 259 S.W.2d 947, 23 CCH Lab. Cas. ¶ 67,719 (Tex. Civ. App. 1953).

were also based on a private common-law cause of action the decision might have been different.³³ In a similar situation, it will be remembered, the New York Court of Appeals held that the plaintiff was obliged first to exhaust the federal administrative remedies.³⁴

State Law Which Goes beyond the NLRA.—If the Supreme Court should ultimately hold that stranger picketing for organizational or recognition purposes does *not* violate the NLRA, the problem posed by present pre-emption arguments will become one of whether or not conduct not outlawed by federal law is still subject to state regulation. On this issue the high state courts seem to be in agreement with the New York Court of Appeals decision in *Goodwins v. Hagedorn*,³⁵ where it was held that state courts retained jurisdiction. The general rule, agreed to by high courts in Pennsylvania³⁶ and California³⁷ this year, is that the states may govern conduct which is neither outlawed nor specifically privileged by national law.

II

UNION UNFAIR PRACTICES AND CONCERTED ACTION

In the area of union unfair practices and concerted action there was during the part of 1953 covered by this article only one legal development of genuinely outstanding significance. That was the group of decisions tending to preserve for picketed employers the right to continued service by common carriers, notwithstanding the existence of collective agreements between such carriers and the Teamsters Union under which Teamster members were not required to extend services to employers involved in labor disputes. Of this group of decisions, that by Federal District Judge Fee probably merits the most careful study owing to the importance, the depth, and the acuity of the opinion (see *Strikes and Boycotts under State Law*, page 375, *infra*).

Other developments recorded hereunder are, however, also notable. Judges all over the country are having brought to their attention the fact that the Teamsters Union's current organizing campaign depends less on individual solicitation of membership than on stranger picket-

³³ *Jacobs v. Clearing Machine Corp.*, 108 N.E.2d 284, 22 CCH Lab. Cas. ¶ 67,227 (Ohio App. 1951).

³⁴ *Costaro v. Simons*, 302 N.Y. 318, 98 N.E.2d 454 (1951).

³⁵ 303 N.Y. 300, 101 N.E.2d 697 (1951); see also *Strauss Stores Corp. v. District 65, DPOWA*, 23 CCH Lab. Cas. ¶ 67,421 (N.Y. Sup. Ct. 1953).

³⁶ *American Brake Shoe Co. v. District Lodge 9, IAM*, 94 A.2d 884, 23 CCH Lab. Cas. ¶ 67,397 (Pa. 1953).

³⁷ *Sommer v. Metal Trades Council*, 254 P.2d 559, 23 CCH Lab. Cas. ¶ 67,455 (Cal. 1953); *Taylor v. Marine Cooks & Stewards Ass'n*, 256 P.2d 595, 23 CCH Lab. Cas. ¶ 67,630 (Cal. App. 1953).

ing, backed up by the pervasive secondary boycotts which the Union is able to impose with the willy-nilly assistance of carriers already "organized." And a review of all the cases may uncover a trend toward the view that such conduct resembles much more the predatory tactics of monopolistic organizations than the courageous free speech of an institution which is representing the heart-felt desires and needs of workers. As will be shown, some courts have held that such "organizational" tactics are plainly coercive of free employee choice; yet it must be noted that other courts still think that they are dealing with privileged free speech. Before long, perhaps, we shall have a definite and authoritative opinion on the question whether stranger "organizational" picketing is a constitutionally privileged form of action. It is needed.

Coercion by Unions: Recognition and Organizational Picketing.—Current thinking in labor relations distinguishes between two types of coercion by labor unions: *physical* coercion in the form of actual or threatened assaults,³⁸ whether by means of individual, personal contacts or by means of such menacing forms of group action as mass picketing; and *economic* coercion, usually exerted in the form of so-called "peaceful" picketing which, by tending to endanger the life of the business picketed, induces both the beleaguered businessman and his employees to yield to the union's demands. While the principle is firmly established that the first type of coercion is unlawful and enjoined (at least in the state courts),³⁹ a review of the 1953 cases indicates considerable uncertainty and confusion in regard to the second.

But the fact that actual violence is universally condemned does not necessarily mean that effective countermeasures or deterrents are always legally available. In the state courts, for example, it may be difficult to reach union funds in an action by injured employees for physical harm done by union members or other agents. Last year, however, the Virginia Supreme Court of Appeals affirmed a judgment of \$130,000 against John Lewis' Mineworkers Union;⁴⁰ two other courts, one state⁴¹ and one federal,⁴² held that union funds might be

³⁸ The New Hampshire Supreme Court held last year that the use of the word "scab" during a labor dispute amounted to "offensive" conduct within the meaning of a state law. *State v. Dyer*, 94 A.2d 718, 23 CCH Lab. Cas. ¶ 67,409 (N.H. 1953).

³⁹ But an ordinance giving a sheriff absolute discretion to deny permits for use of public ways was declared unconstitutional as applied to picketing. *Haggerty v. Kings County*, 236 P.2d 393, 23 CCH Lab. Cas. ¶ 67,611 (Cal. App. 1953).

⁴⁰ *United Construction Workers, UMWA v. Laburnum Construction Corp.*, 75 S.E.2d 694, 23 CCH Lab. Cas. ¶ 67,542 (Va. 1953).

⁴¹ *Nelson v. Haley*, 111 N.E.2d 812, 23 CCH Lab. Cas. ¶ 67,559 (Ind. 1953).

⁴² Diversity of citizenship brought this case into the federal court. *White v. Quisenberry*, 14 F.R.D. 348, 24 CCH Lab. Cas. ¶ 67,839 (W.D. Mo. 1953).

reached where a union agent had acted within the scope of his employment in committing an assault and battery; while another federal court refused to take a damages action, on the theory that physical coercion of employees, in the federal system, violates the NLRA and is therefore subject to the exclusive jurisdiction of the NLRB.⁴³ One can readily understand why employees are unwilling to use NLRB facilities when it is known that for even the most egregious types of physical brutality the NLRB will impose no sanction other than a mere cease and desist order against the guilty union and its agents.⁴⁴ As to injunctive relief against menacing union action, the state courts during the past year seemed undisposed to enjoin all picketing simply because there had been some violence.⁴⁵ One of the most fascinating "restraining" orders of the year was the one in which New York Supreme Court Justice McNally "limited" to *two hundred* the number of persons who might picket at one time before the Manhattan branch of the Hearn Department Stores.^{46a}

Far more interesting—and as chaotic as it is interesting—is the legal situation where picketing is overtly peaceful, but is intended either to put pressure on the employer to recognize the union as exclusive bargaining representative, or to "induce" the employees to join the union, or both—so-called "recognition" and "organizational" picketing. Almost without exception such picketing is engaged in by a union which represents either none or very few of the employees of the picketed business. In other words, it is usually "stranger" picketing. Every case involving stranger picketing for recognition or organizational purposes, when accurately analyzed, requires the evaluation of two sets of doctrines which are tolerably clearly mutually exclusive, so that the acceptance of one should necessitate the exclusion or subordination of the other. Some courts during the past year proceeded on that basis; others, probably a majority, tended to confuse the two doctrines, or at least to refuse to follow to a logical conclusion their acceptance of the one or the other.

⁴³ McNutt v. United Gas, Coke & Chemical Workers, 108 F. Supp. 871, 22 CCH Lab. Cas. ¶ 67,298 (W.D. Ark. 1952).

⁴⁴ Cf. NLRB v. United Mine Workers, 202 F.2d 177, 22 CCH Lab. Cas. ¶ 67,388 (3d Cir. 1953); NLRB v. United Brotherhood of Carpenters & Joiners, 205 F.2d 515, 23 CCH Lab. Cas. ¶ 67,688 (10th Cir. 1953).

⁴⁵ E.g., Bell-Moritt Corp. v. District 50, UMW, 23 CCH Lab. Cas. ¶ 67,610 (Pa. C.P. 1953); Lodge Mfg. Co. v. Gilbert, 260 S.W.2d 154, 23 CCH Lab. Cas. ¶ 67,737 (Tenn. 1953).

^{46a} Hearn Department Stores, Inc. v. Livingston, 124 N.Y.S.2d 552, 23 CCH Lab. Cas. ¶ 67,710 (Sup. Ct. 1953). But the decree did hopefully declare that "threats, violence and intimidation may not . . . be resorted to." And on appeal, the Appellate Division modified the decree to enjoin pendente lite all picketing. 125 N.Y.S.2d 187, 24 CCH Lab. Cas. ¶ 67,862 (1st Dep't 1953).

The two doctrines in question may be labeled the "modern labor relations principle" and the "picketing-free speech principle." In cases involving stranger picketing for recognition or organizational purposes the labor relations principle would lead to an analysis along these lines: employees have a right to join or not to join a union and they have a right to make up their minds on the issue entirely free of coercion, economic or otherwise, imposed by either union or employer;⁴⁶ picketing designed to influence that decision is coercive economically because it operates to endanger the jobs of the employees in question, acting as it does to proscribe the picketed premises, to cut it off from vital markets and supplies;⁴⁷ therefore a state court should enjoin the picketing as an unjustified imposition of harm, and the NLRB and the associated federal courts should hold it unlawful restraint or coercion of free employee choice under the NLRA. It will be noted that this application of the labor relations principle makes no distinction between recognition and organizational and publicity picketing, considering all these types to be in substance the same, in relation to the labor relations principle with its emphasis upon employee choice, free of union or employer coercion, economic or otherwise.

In one of the two or three outstanding decisions of 1953, the United States Court of Appeals for the Ninth Circuit developed this approach exhaustively, applying it to hold that a union was guilty of restraint and coercion under the NLRA when it engaged in primary and secondary picketing, some of it addressed to the consuming public, in an effort to "organize" certain employees and to secure recognition as their exclusive bargaining representative.⁴⁸ According to the court:

Nothing could more strongly restrain Service's employees from retaining their non-union status or coerce them into joining the Bakery Union than stopping or making intermittent their employment by picketing with appeals to persuade the public to boycott the products of their work. The evidence shows that all of the picketed stores did cease to sell the products manufactured by Service's employees. Here is more than an appeal to the *employees* to persuade *their* action. Here is

⁴⁶ For cases focusing attention on the crucial position of the nonunion employee of a picketed establishment see *Kitson v. Waiters & Waitresses Union*, 80 Pa. Dist. & Cir. Rep. 130, 22 CCH Lab. Cas. ¶ 67,219 (Pa. C.P. 1952); *Miami Typographical Union v. Ormerod*, 61 So.2d 753, 22 CCH Lab. Cas. ¶ 67,293 (Fla. 1953).

⁴⁷ For cases showing in factual detail how picketing may operate to proscribe an employer see *Richman Bros. Co. v. Amalgamated Clothing Workers*, 23 CCH Lab. Cas. ¶ 67,535 (Ohio C.P. 1953); *Winkelman Bros. v. IBT Local 299*, 22 CCH Lab. Cas. ¶ 67,262 (Mich. Cir. Ct. 1952).

⁴⁸ *Capital Service, Inc. v. NLRB*, 204 F.2d 848, 23 CCH Lab. Cas. ¶ 67,615 (9th Cir. 1953). The NLRB takes a contrary view of the legality of both recognition and organizational picketing. See *Richman Bros. Co. v. Amalgamated Clothing Workers*, 114 F. Supp. 185, 23 CCH Lab. Cas. ¶ 67,500 (N.D. Ohio 1953).

successful economic coercion tending to prevent them from exercising their right to work, by diminishing the public consumption of the product of their work.⁴⁹

Since innumerable decisions under the NLRA have held that an employer is guilty of unlawful coercion of free employee choice when he conditions employment on renouncing union membership, the court found it impossible to hold that the Act's similar proscription of union coercion should not outlaw union action which puts economic pressure on the employees to join the union.

Pursuing the same line of analysis, the Michigan Supreme Court reached precisely the same result, applying the statutory policy of Michigan.⁵⁰ Reviewing the testimony of the defendant union's agent as to the scope and objectives of the peaceable stranger picketing for organizational and recognition purposes, the court noted that the agent had expressly stated that by the picketing the union hoped to reduce the income of the employees and thus to "induce" them to join. According to the court, there could be no doubt that the union's conduct was conceived and that it operated plainly on a basis of economic coercion and should therefore be enjoined as violative of both the Taft-Hartley Act and Michigan law and policy. High state courts in Alabama⁵¹ and Kentucky⁵² reached the same result last year.⁵³

While rigorous, straightforward application of the labor relations principle leads to the results just sketched, similar application of the picketing-free speech principle would lead to the conclusion that stranger picketing for recognition or organizational or publicity purposes may not be constitutionally enjoined, at least where it is overtly peaceable in nature. For several years now, however, no court has felt obliged to follow the picketing-free speech analysis so rigorously. Today that analysis serves only to confuse.

Thus most courts today seem to be of the opinion that the picketing-free speech approach is not applicable where the picketing union seeks by its picketing to secure exclusive bargaining status without the majority employee support which the labor relations

⁴⁹ *Capital Service, Inc. v. NLRB*, 204 F.2d 848, 853, 23 CCH Lab. Cas. ¶ 67,615 (9th Cir. 1953).

⁵⁰ *Way Baking Co. v. Teamsters and Truck Drivers Local 164*, 56 N.W.2d 357, 22 CCH Lab. Cas. ¶ 67,318 (Mich. 1953).

⁵¹ *Kinard Construction Co. v. Building Trades Council*, 64 So.2d 400, 23 CCH Lab. Cas. ¶ 67,467 (Ala. 1953).

⁵² *Blue Bear Cafeteria Co. v. Hotel & Restaurant Employees*, 254 S.W.2d 335, 22 CCH Lab. Cas. ¶ 67,317 (Ky. 1952). See also *Hotel & Restaurant Employees v. Lambert*, 258 S.W.2d 694, 23 CCH Lab. Cas. ¶ 67,653 (Ky. 1953).

⁵³ Cf. the probably similar decisions in *Saperstein v. Rich*, 114 N.Y.S.2d 779, 22 CCH Lab. Cas. ¶ 67,242 (Sup. Ct. 1952); *Grimes & Hauer, Inc. v. Pollock*, 23 CCH Lab. Cas. ¶ 67,506 (Ohio C.P. 1953).

principle emphasizes.⁵⁴ So, as a general rule, the state courts during the past year enjoined stranger recognition picketing where the picketing union had previously been defeated in an election conducted by a labor relations board;⁵⁵ or where the union was seeking representative status in a bargaining unit found inappropriate by the NLRB;⁵⁶ or where a representation proceeding was pending before a labor relations board;⁵⁷ or where the union's lack of majority status was demonstrated in some convincing though informal manner.⁵⁸ Picketing was enjoined, moreover, where the court found that, despite protestations that the picketing was designed to organize employees and to redress grievances, the real purpose was to secure representative status without the required majority support.⁵⁹ The New York Appellate Division, it must be noted specially, went so far as to hold that recognition picketing may be enjoined even though no representation petition has ever been filed; in this court's opinion, a union seeking

⁵⁴ Where it appears that the picketing union represents a majority of the employees, an injunction is not granted. *Shiland v. Retail Clerks*, 66 So.2d 146, 23 CCH Lab. Cas. ¶ 67,720 (Ala. 1953); *Klein v. Freedman*, 119 N.Y.S.2d 257, 22 CCH Lab. Cas. ¶ 67,315 (Sup. Ct. 1953).

⁵⁵ *Wisconsin Employment Relations Board v. Retail Clerks*, 58 N.W.2d 655, 23 CCH Lab. Cas. ¶ 67,646 (Wis. 1953). But see *Min Sang Wet Wash Co. v. Simon*, 124 N.Y.S.2d 768, 23 CCH Lab. Cas. ¶ 67,734 (Sup. Ct. 1953).

⁵⁶ *Acryvin Corp. v. Sanchez*, 124 N.Y.S.2d 130, 24 CCH Lab. Cas. ¶ 67,779 and 24 CCH Lab. Cas. ¶ 67,794 (Sup. Ct. 1953).

⁵⁷ *Cordey China Co. v. United Mine Workers*, 96 A.2d 696, 23 CCH Lab. Cas. ¶ 67,627 (N.J. 1953); *Ithaca Transp. Serv., Inc. v. IBT Local 529*, 24 CCH Lab. Cas. ¶ 67,788 (N.Y. Sup. Ct. 1953); *Plastic Calendaring Corp. v. Spilberg*, 121 N.Y.S.2d 297, 23 CCH Lab. Cas. ¶ 67,464 (Sup. Ct. 1953).

⁵⁸ *Klibanoff v. Tri-Cities Retail Clerks' Union*, 64 So.2d 393, 23 CCH Lab. Cas. ¶ 67,468 (Ala. 1953); *Rubin v. American Sportsmen Television Equity Society*, 254 P.2d 510, 23 CCH Lab. Cas. ¶ 67,454 (Cal. 1953); *Gillespie Construction Co. v. International Hod Carriers Union*, 23 CCH Lab. Cas. ¶ 67,735 (Fla. Cir. Ct. 1953); *Bitzer Motor Co. v. Local 604, IBT*, 110 N.E.2d 674, 23 CCH Lab. Cas. ¶ 67,432 (Ill. App. 1953); *Wischhusen v. Griffin*, 23 CCH Lab. Cas. ¶ 67,683 (Md. City Ct. 1953); *Amazon v. Hotel and Restaurant Beverage Dispensers*, 23 CCH Lab. Cas. ¶ 67,469 (N.Y. Sup. Ct. 1953); *Bean v. Retail Clerks Local 698*, 24 CCH Lab. Cas. ¶ 67,767 (Ohio App. 1953); *Miller v. Distributive, Processing & Office Workers Union*, 81 Pa. Dist. & Cir. Rep. 598, 23 CCH Lab. Cas. ¶ 67,487 (Pa. C.P. 1953).

⁵⁹ *Grossinger, Inc. v. Burke*, 124 N.Y.S.2d 40, 24 CCH Lab. Cas. ¶ 67,816 (Sup. Ct. 1953). However, where the judges were convinced that the picketing was conducted by employees actually to redress grievances, injunctive relief was denied. *Gabriel Steel Co. v. Mechanics Educational Society*, 23 CCH Lab. Cas. ¶ 67,721 (Mich. Cir. Ct. 1953); *Alter v. Jones*, 120 N.Y.S.2d 709, 23 CCH Lab. Cas. ¶ 67,427 (Sup. Ct. 1953); *Hearn Department Stores v. Livingston*, 23 CCH Lab. Cas. ¶ 67,654 (N.Y. Sup. Ct. 1953); *Sound Ship Building Corp. v. Sullivan*, 23 CCH Lab. Cas. ¶ 67,603 (N.Y. Sup. Ct. 1953); *Thurber v. Demetriades*, 23 CCH Lab. Cas. ¶ 67,676 (N.Y. Sup. Ct. 1953). But stranger picketing was enjoined even though provoked by an allegedly discriminatory discharge in *Tarr v. Amalgamated Association of Street Electric Ry. Employees*, 250 P.2d 904, 22 CCH Lab. Cas. ¶ 67,232 (Ida. 1952).

recognition should pursue legal procedures—a labor board election and certification—it should not picket.⁶⁰

This recapitulation indicates that the courts are by and large prone to accept the supremacy of the labor relations principle of free, uncoerced employee choice of bargaining representatives; as is readily apparent from a perusal of the cases, the courts do not hesitate to reject spurious union explanations of the motives and objectives of their picketing. Yet, in case after case judges will say that while stranger picketing for recognition is unlawful and enjoined, unions are still privileged to picket for organizational purposes.⁶¹ And it is also not uncommon to find a judge making distinctions among (1) recognition, (2) organizational, and (3) publicity picketing—with either the first or the first two of these types being considered unlawful and enjoined, and the third type being considered constitutionally sacrosanct.⁶² As has been noted, courts which apply the labor relations principle consistently have concluded that all such distinctions are meaningless; that all picketing amounts to economic coercion of the businessman and the employees picketed. In the latter courts an injunction is meaningful; it prohibits all stranger or minority picketing. But in the other courts the injunctions so frequently framed mean nothing: the union found guilty of unlawful picketing may continue to picket, usually under the express terms of the decree, if it only holds its mouth differently, saying that the picketing has become “organizational” or that its purpose is to “publicize.” Naturally, in the real world of union blockades, this makes no difference. The Teamsters Union, the key element in union blockades, seldom if ever distinguishes between organizational and recognition picket lines. In fact, a standard form of Teamsters collective agreement insists that union members are free to refuse to perform services (*i.e.*, make

⁶⁰ *Chic Maid Hat Mfg. Co. v. Korba*, 121 N.Y.S.2d 354, 23 CCH Lab. Cas. ¶ 67,566 (App. Div., 4th Dep't 1953); see also *Tarrytown Road Restaurant, Inc. v. Hotel & Restaurant Beverage Dispensers*, 23 CCH Lab. Cas. ¶ 67,485 (N.Y. Sup. Ct. 1953). But see *Sound Ship Building Corp. v. Sullivan*, 23 CCH Lab. Cas. ¶ 67,544 (N.Y. Sup. Ct. 1953) (denying injunctive relief against stranger picketing for recognition).

⁶¹ *Garner v. Teamsters Union*, 94 A.2d 893, 23 CCH Lab. Cas. ¶ 67,396 (Pa.), *aff'd*, 74 Sup. Ct. 161 (1953); *Bon-Flo Taxi Corp. v. Norton*, 118 N.Y.S.2d 249, 22 CCH Lab. Cas. ¶ 67,231 (Sup. Ct. 1952); *A.B.C. Comet Messenger Service, Inc. v. Leone*, 23 CCH Lab. Cas. ¶ 67,413 (N.Y. Sup. Ct. 1953); *Kleet v. O'Rourke*, 23 CCH Lab. Cas. ¶ 67,677 (N.Y. Sup. Ct. 1953); *Min Sang Wet Wash Co. v. Simon*, 23 CCH Lab. Cas. ¶ 67,734 (N.Y. Sup. Ct. 1953); *Rose Embroidery Corp. v. Freedman*, 119 N.Y.S.2d 557, 23 CCH Lab. Cas. ¶ 67,426 (App. Div., 1st Dep't 1953); *Wood v. O'Grady*, 23 CCH Lab. Cas. ¶ 67,696 (N.Y. Sup. Ct. 1953); *Pappas v. Local Joint Executive Board*, 96 A.2d 915, 23 CCH Lab. Cas. ¶ 67,626 (Pa. 1953); *Seranton Frocks, Inc. v. ILGWU Local 109*, 23 CCH Lab. Cas. ¶ 67,641 (Pa. C.P. 1952); *Wisconsin Employment Relations Board v. Retail Clerks*, 58 N.W.2d 655, 23 CCH Lab. Cas. ¶ 67,646 (Wis. 1953).

⁶² *Cf. Saperstein v. Rich*, 22 CCH Lab. Cas. ¶ 67,242 (N.Y. Sup. Ct. 1952).

pick-ups and deliveries) in connection with any business which is involved in any kind of a labor dispute.⁶³ Transport companies virtually without exception sign such agreements, and honor them by withdrawing services from any picketed employer. And thus the picketed employer, his employees, and the concept of free employee choice must all yield. Whether the picketing be called "recognition picketing," "organizational picketing," or "publicity picketing" makes no difference in the real world.

Discrimination by Unions: Compulsory Union Membership.—There was litigation of all kinds and on all levels last year on the subject of compulsory unionism; but the most significant was probably that which occurred in the various United States courts of appeals in cases arising under the NLRA. These courts reviewed a large number of NLRB decisions, and in the process did much to clarify points which, justifiably or not, had been considered uncertain. Litigation in the state courts was largely preoccupied with the efforts of the Barbers Union to make master barbers pay for membership without enjoying the basic privileges of membership, although, as will be shown, there was another interesting state court decision. The United States Supreme Court saw fit to pass on a compulsory union problem which, according to some opinion, had already been answered definitively by previous decisions of the highest court. Meanwhile, the recent amendment to the Railway Labor Act,⁶⁴ permitting compulsory unionism in the railroad industry to about the same extent as the NLRA permits it in industry generally, took a first few tentative steps through the courts. The prognosis is that it will walk.

A union violates the NLRA's compulsory unionism proscriptions where it causes or attempts to cause an employer to encourage or discourage union membership by discrimination in employment.⁶⁵ With the statute so written, both union and employer may, at least superficially, be regarded as guilty of the same unfair labor practice. Of course where a union takes aggressive action to compel an employer to discharge a nonunion worker, unsophisticated—or perhaps sophisticated—opinion would be likely to consider the union culpable; and the employer only a hapless in-between, acted upon rather than acting. The NLRB, however, has established the principle that in such cases it is possible to prosecute the employer alone, holding him guilty of an unfair labor practice and making him give back pay to the employee-

⁶³ For the Teamsters' standard collective agreement, a colossal blockade imposed by the Teamsters, and the acquiescence of carriers, therein, see *Montgomery Ward & Co. v. Northern Pacific Terminal Co.*, 23 CCH Lab. Cas. ¶ 67,713 (D. Ore. 1953).

⁶⁴ 49 Stat. 1189 (1936), as amended, 45 U.S.C.A. §§ 181-88 (Supp. 1953).

⁶⁵ 61 Stat. 140 (1947), 29 U.S.C. § 158(a)(3) (Supp. 1952); 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(2) (Supp. 1952).

victim of the union's pressure. This year, while noting that there is something to be said for prosecuting the union in such cases, the third circuit affirmed an NLRB decision and order issued against an employer alone, noting that it (the court) could not hold that such an order does not effectuate the policies of the Act.⁶⁶ At the same time, the Courts of Appeals for the First⁶⁷ and the Ninth⁶⁸ Circuits likewise approved NLRB orders issued against unions alone in similar types of cases, affirming the Board's reasoning that, since a union may violate the Act by even an unsuccessful *attempt* to cause the employer to discriminate, it may be held solely responsible for discrimination in a proceeding in which the employer is not joined as a party. Completing the possibilities, the ninth circuit enforced a Board order which made employer and union jointly and severally liable for back pay in a discrimination case.⁶⁹

There is still some doubt as to the circumstances in which it is unlawful for an employer to do his hiring exclusively through union agencies, but decisions last year reaffirmed the principle that such arrangements are definitely unlawful where the union discriminates in favor of its own members.⁷⁰ And although the Act states that union-shop contracts are permissible only if they require membership after thirty days of employment, or thirty days after the effective date of the agreement, whichever is later, the third circuit has told the NLRB that this provision is not to be mechanically enforced; so that if an existing employee has actually been given more than thirty days in which to join, he may lawfully be discharged even though the agreement does not expressly give him thirty days. The Board erred, the court held, in invalidating this contract for so pedantic a reason.⁷¹ The ninth circuit showed itself similarly out of sympathy with the Board's penchant for invalidating collective agreements simply because they contain an unpermissible union-security clause.⁷² So too did the

⁶⁶ *Eichley Corp. v. NLRB*, 206 F.2d 799, 24 CCH Lab. Cas. ¶ 67,802 (3d Cir. 1953); cf. *NLRB v. Cantrall*, 201 F.2d 853, 23 CCH Lab. Cas. ¶ 67,399 (9th Cir.), cert. denied, 345 U.S. 996 (1953); *NLRB v. Swinerton*, 202 F.2d 511, 23 CCH Lab. Cas. ¶ 67,428 (9th Cir. 1953).

⁶⁷ *NLRB v. Local 57, Operating Engineers*, 201 F.2d 771, 22 CCH Lab. Cas. ¶ 67,384 (1st Cir. 1953).

⁶⁸ *NLRB v. Venetian Blind Workers' Union*, 207 F.2d 124, 24 CCH Lab. Cas. ¶ 67,845 (9th Cir. 1953).

⁶⁹ *NLRB v. Pinkerton's National Detective Agency, Inc.*, 202 F.2d 230, 22 CCH Lab. Cas. ¶ 67,393 (9th Cir. 1953).

⁷⁰ *NLRB v. Local 743, UBCJ*, 202 F.2d 516, 23 CCH Lab. Cas. ¶ 67,429 (9th Cir. 1953); *NLRB v. F. H. McGraw & Co.*, 206 F.2d 635, 23 CCH Lab. Cas. ¶ 67,651 (6th Cir. 1953).

⁷¹ *NLRB v. United Electrical Workers*, 203 F.2d 673, 23 CCH Lab. Cas. ¶ 67,539 (3d Cir. 1953).

⁷² *NLRB v. Sterling Furniture Co.*, 202 F.2d 41, 23 CCH Lab. Cas. ¶ 67,406 (9th Cir. 1953).

Supreme Court, in a case in which the basic issue was whether an employee had violated a collective agreement in refusing to cross a picket line.⁷³

In an extremely instructive opinion, Circuit Judge Staley reversed an NLRB holding to the effect that an employer had committed an unfair practice in discharging an employee who had been expelled from membership by his union.⁷⁴ The employee had been expelled because he had betrayed his union in an especially egregious fashion: as an officer of the union, he refused to sign a non-Communist affidavit, intending thereby to make it impossible for the union to participate in a forthcoming election battle with a rival union. In its mechanical way the Board had noted that the Act permits a discharge under a union-shop contract only where the dischargee has refused to pay dues or uniform membership fees; and since the dischargee here had not so refused, the Board had held, the discharge was unlawful. The court, on the other hand, agreed that the discharge could be considered a technical violation of the Act; but it went on to point out that the dischargee had himself been guilty of subversion of one of the major policies of the Act: by his collusive conduct he had been instrumental in denying employees a free choice of representatives. In the circumstances, the court held, it would not effectuate the policies of the Act to grant him reinstatement with back pay. This is not to say, of course, that discharges for dual unionism are now privileged under the Act. As the ninth circuit held during the year, an employee may not be discharged under a union-shop agreement merely because he has refused to pay a large fine imposed by his union for his activities in favor of a rival union.⁷⁵ This type of dual unionism—really a legitimate exercise of employee free choice—is precisely the type of dual unionism which Taft-Hartley meant to protect when it provided that an employee might be discharged under a union-shop agreement only where he refused to pay uniform dues and membership fees.

The NLRB's arbitrary decision⁷⁶ that unions may be ordered to make employees whole for wages lost only in 8(b)(2) cases has been weakened, though not reversed, by another decision of the ninth circuit.⁷⁷ In this decision the court held that Section 8(b)(2) was not violated where an employee was discharged merely because he

⁷³ NLRB v. Rockaway News Supply Co., 345 U.S. 71 (1953).

⁷⁴ NLRB v. Kingston Cake Co., 206 F.2d 604, 23 CCH Lab. Cas. ¶ 67,739 (3d Cir. 1953).

⁷⁵ NLRB v. International Ass'n of Machinists, 203 F.2d 173, 23 CCH Lab. Cas. ¶ 67,479 (9th Cir. 1953).

⁷⁶ See Note, Back Pay Awards against Unions under the LMRA, 51 Col. L. Rev. 508 (1951).

⁷⁷ NLRB v. Reed, 23 CCH Lab. Cas. ¶ 67,457 (9th Cir. 1953).

had not secured clearance from his own union before accepting employment, since the discharge could not and did not discourage or encourage union membership. However, the court held, the discharge did violate Section 8(b)(1) of the Act, in that it restrained and coerced the employee in the exercise of his right to refrain from assisting or cooperating with a labor organization. Contrary to the Board, which insists that it has no power to award back pay in 8(b)(1) cases, the court said that the employee should be made whole for his loss of wages.

In one of the few cases under the NLRA in which the rampaging Teamsters Union has been made to pay for unlawful conduct in its current organizing campaign, during which it has attempted to force innumerable employers to recognize it as exclusive bargaining agent for unwilling employees, the first circuit enforced a Board order requiring the Teamsters to refund initiation fees and dues deducted from the wages of employees.⁷⁸ Teamsters had forced the employer to deduct the dues and fees even though at the time there was an existing representation question—a question which was later to be resolved against the Teamsters.

In other litigation, the legal problems were less complex. The United States Supreme Court ruled that the Virginia courts could constitutionally enjoin picketing for compulsory unionism purposes contrary to the Virginia "right to work" law.⁷⁹ Since the Court had already ruled that such laws are constitutional⁸⁰ and that picketing seeking a violation of valid state law may constitutionally be enjoined,⁸¹ one may wonder why the Supreme Court granted certiorari in this case, while denying it in so many other cases where clarification is sorely needed. However, justification for the Court's exercise of jurisdiction may be found in the dissenting opinion of Mr. Justice Douglas. (Mr. Justice Black also dissented, but without filing an opinion.) Mr. Justice Douglas thought that if the objective of the picketing was to get nonunion men fired, it could constitutionally be enjoined; but that if the objective was "simply" to let union men know that nonunion men were employed, it was an exercise of the right of free speech and should therefore not be enjoined. This of course is another example of the extraordinary failure of some judges to see that these objectives are always inextricably intertwined. If the case was taken in order to demonstrate that a large majority of the present Supreme

⁷⁸ *NLRB v. Local 404, IBT*, 205 F.2d 99, 23 CCH Lab. Cas. ¶ 67,666 (1st Cir. 1953).

⁷⁹ *Local 10, United Ass'n of Journeymen Plumbers v. Graham*, 345 U.S. 192 (1953).

⁸⁰ *Lincoln Federal Labor Union, v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949).

⁸¹ *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949).

Court justices is aware of the constant concurrence of these objectives, the grant of certiorari was, needless to say, of real utility.

The Railway Labor Act's new union-shop provision has been upheld as constitutional, although the courts have not yet had an opportunity to apply its detailed provisions.⁸² Furthermore, as a law of the United States, it has been held superior to state "right to work" laws.⁸³ In a questionable opinion,⁸⁴ the third circuit has held that a union representing both Negro and white members may lawfully agree to discriminatory conditions of employment for its Negro members.⁸⁵

In three decisions, each based on largely different legal considerations and doctrines, the highest courts in Colorado,⁸⁶ Massachusetts,⁸⁷ and New Jersey⁸⁸ foiled efforts by the Barbers Union to foist on employing barbers a second-class membership which would give the employers the right, practically speaking, only to contribute to the financial support of the union. Perhaps the most interesting of the state court decisions in this field was that of a Michigan circuit court last year. This court upheld a jury verdict awarding damages to a nonunion employee who had been discharged when a union threatened to strike and picket if he should be continued in employment.⁸⁹

Strikes and Boycotts under Federal Law.—While a few cases dealt with other types of federal regulation of strikes and boycotts, the bulk of the federal cases on the subject were concerned with the Taft-Hartley Act. Federal courts upheld this year as they have in the past Taft-Hartley's national-emergency strike procedures. Over union contentions that the Act abuses judicial power in providing for injunctive relief against strikes which are nowhere declared unlawful, the courts insisted that a strike endangering national health and safety

⁸² *Otten v. Baltimore & Ohio R.R.*, 205 F.2d 58, 23 CCH Lab. Cas. ¶ 67,661 (2d Cir. 1953); cf. *Sandsberry v. Gulf, Colorado & Santa Fe Ry.*, 24 CCH Lab. Cas. ¶ 67,787 (N.D. Tex. 1953).

⁸³ *In re Florida East Coast Ry.*, 201 F.2d 325, 24 CCH Lab. Cas. ¶ 67,806 (S.D. Fla. 1953). See *Local 234, United Ass'n of Journeymen and Apprentices v. Henley & Beckwith, Inc.*, 66 So.2d 818, 24 CCH Lab. Cas. ¶ 67,765 (Fla. 1953) (declaring the closed shop prohibited under the Florida Constitution).

⁸⁴ *Williams v. Yellow Cab Co. of Pittsburgh*, 200 F.2d 302, 22 CCH Lab. Cas. ¶ 67,280 (3d Cir. 1952).

⁸⁵ See *Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944); *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768 (1952).

⁸⁶ *Journeymen Barbers v. Industrial Comm'n of Colorado*, 260 P.2d 941, 24 CCH Lab. Cas. ¶ 67,801 (Colo. 1953) (holding union's attempt to withdraw union-shop card unlawful as intended to make employer contribute financial support to a union, contrary to Colorado law).

⁸⁷ *DiLeo v. Daneault*, 109 N.E.2d 824, 22 CCH Lab. Cas. ¶ 67,353 (Mass. 1953) (largely similar to ruling cited in preceding note).

⁸⁸ *Simon v. Journeymen Barbers*, 94 A.2d 840, 23 CCH Lab. Cas. ¶ 67,424 (N.J. 1953) (enjoining picketing as for unlawful objective).

⁸⁹ *Edwards v. Grisham*, 23 CCH Lab. Cas. ¶ 67,536 (Mich. Cir. Ct. 1953).

is inherently subject to legislative and judicial control, whether or not the legislature sees fit to declare such a strike unlawful.⁹⁰ In other cases which need only brief notation, one federal district court upheld as sufficient an antitrust indictment which charged the AFL's Brotherhood of Electrical Workers with a blockade against competition in the production and installation of electrical equipment;⁹¹ and another dismissed a similar charge against the AFL's Lathers' Union, holding that the effect on interstate commerce was insufficient.⁹²

More important, probably, and certainly more numerous were the cases involving the strike and boycott sections of the Taft-Hartley Act. And of these, the most important is the seventh circuit's decision in the *Joliet Contractors* case.⁹³ Very generally stated, that case involved efforts by the AFL's Glaziers Union to prevent the use of pre-glazed sash in construction work. The union called or induced strikes on building projects where such sash was used, and in other instances refused to supply workers, or induced union members to refuse to apply for work, on such projects. One key to the union's action was a union "law" prohibiting members to work on projects where pre-glazed sash was used. Meticulously applying the express and specific wording of Section 8(b)(4)(A) of the Act—which words the court found precise and unambiguous—the court held that the union was guilty of an unfair practice in inducing concerted refusals to work, even though the inducement might have been based in part on the above-described union "law." It held, furthermore, that it could find no basis in the law for the NLRB's distinction between "primary" and "secondary" union action. On the other hand, the court ruled that the union did not violate the statute either in inducing single employees to quit work as individuals, and not in groups, or in encouraging or even compelling individual union members to refuse to apply for work on so-called "unfair" building projects. As to the latter, the court went on to observe that, in its opinion, there might be grave constitutional objections to a law which would deny the privilege of refusing to apply for work. However, the court itself admitted, later in the opinion, that both its decision and that of the Board left certain anomalies:

⁹⁰ *United States v. United Steelworkers of America*, 202 F.2d 132, 23 CCH Lab. Cas. ¶ 67,422 (2d Cir. 1953); see also *United States v. International Union, United Mine Workers of America*, 89 F. Supp. 184, 22 CCH Lab. Cas. ¶ 67,356 (D.D.C. 1950).

⁹¹ *United States v. Chattanooga Chapter, National Electrical Contractors Ass'n*, 24 CCH Lab. Cas. ¶ 67,784 (E.D. Tenn. 1953).

⁹² *Howard v. Local 74, Wood, Wire & Metal Lathers Int'l Union*, 24 CCH Lab. Cas. ¶ 67,758 (N.D. Ill. 1953).

⁹³ *Joliet Contractors Ass'n v. NLRB*, 202 F.2d 606, 22 CCH Lab. Cas. ¶ 67,387 (7th Cir. 1953).

As we study this record we are increasingly impressed with the numerous apparent incongruities which abound in the reasoning of the Board, and which we must admit this opinion does little to eliminate. For instance, if two or more glaziers refuse to accept employment because of the use of preglazed sash there is no violation as they have not concertedly refused to work in the course of their employment. However, if they discover the use of preglazed sash after they are on the job and then refuse to work, it is a violation because they have done so in the course of their employment. At the same time, if there is only one glazier on each of several jobs and they each refuse to work, it is not a violation because their refusal is not concerted. These incongruities and others which could be mentioned are unavoidable because of the plain unambiguous language employed by Congress in enumerating the elements required to constitute a violation.⁹⁴

As to the situation in which individual glaziers, each working on different projects, refuse separately to continue work which they have already started, it might be suggested that both the Board and seventh circuit are guilty of an exceedingly wooden interpretation of the words of a statute the spirit of which plainly condemns such boycotting, at least where it is unquestionably the product of union action, as it was in the *Joliet Contractors* case. The same might well be said of the "individual" refusals to *apply* for work on projects where preglazed sash is used. Here, however, it is not entirely unreasonable to require specific outlawry by Congress—in so many words—for such a prohibition goes pretty far. Yet the court's expressed fears for the constitutionality of such a prohibition seem baseless. Presumably, such fears are based on "involuntary servitude" thinking. But it seems scarcely tenable to contend that Congress imposes involuntary servitude where it insists that a labor organization may not directly or indirectly condition employment on a stipulation that amounts to a restraint of trade and a predatory monopolistic barrier against technological advance. The point is that Congress would prohibit, not the exercise by an individual of an individual desire to work or not to work, but a concerted, institutionalized decision contrary to the national policy in favor of free trade. As to the enforceability of such a prohibition, there is no reason to believe that it could not be enforced as effectively as the courts have enforced the Sherman Act's prohibitions against concerted action for monopolistic purposes.

Another decision meriting some comment is the one in which a district court⁹⁵ applied the theory, first conceived by the Board and then confirmed by the second circuit,⁹⁶ that a labor union could induce a concerted work stoppage in plain violation of the Act, so long as

⁹⁴ Id. at 612.

⁹⁵ *Madden v. Local 442, IBT*, 24 CCH Lab. Cas. ¶ 67,857 (W.D. Wis. 1953).

⁹⁶ *Rabouin v. NLRB*, 195 F.2d 906, 21 CCH Lab. Cas. ¶ 66,836 (2d Cir. 1951).

the induced employees were working under a collective agreement permitting them to refuse to handle the goods of any employer engaged in a labor dispute. These "hot goods" contracts seem to be practically universal in the motor carrier industry, an industry in which the employers are virtually unable to resist union demands, owing to the overwhelming power of the Teamsters Union. Under this decision, therefore, any employer whose business depends on the services of motor carriers—and it would seem that any business of any size depends more or less on such services—is denied the protection of the Taft-Hartley Act against even the most plainly unlawful types of union action. And he is denied this protection, it must be noted, not by anything which may be found in the Act itself, but on the basis of a private agreement between a union and other employers. How this result can possibly be justified, especially in the presence of innumerable precedents to the effect that the rights and duties imposed by the NLRA are public rights and duties which private parties cannot waive through private agreement, is not apparent. Some mitigation of the situation is offered by District Judge Fee's holding to the effect that common carriers are liable in damages for withholding services from businesses which are quarantined by labor action.⁹⁷ But since the NLRB will probably discontinue seeking injunctive relief against boycotts predicated on "hot goods" clauses,⁹⁸ now that another district court has followed the second circuit in holding such boycotts privileged, the only really effective remedy—immediate injunctive relief—will not be forthcoming, in the federal system at any rate.

A decision worth noting for its curiosity value if for nothing else is that of the second circuit, affirming a Board holding to the effect that a union violates the Act in "roving situs" cases where it keeps pickets posted at the place of business of a "secondary" employer after the "roving situs" of the "primary labor dispute" has left the "secondary premises."⁹⁹ (This is the kind of gobbledygook which the Board's casuistry in the application of Section 8(b)(4) has come to necessitate.) The decision in question means very little in terms of enforcing the policies of the Act against secondary union action. In fact it is really something in the nature of a clerical error for a union to continue picketing premises after a "roving situs" has left. The union is interested only in proscribing the said "roving situs";

⁹⁷ *Montgomery Ward & Co. v. Northern Pacific Terminal Co.*, 23 CCH Lab. Cas. ¶ 67,713 (D. Ore. 1953).

⁹⁸ See the Administrative Decision of the NLRB General Counsel, Case No. 621, April 8, 1953, and No. 658, May 11, 1953, declining to prosecute charges of violations of Section 8(b)(4).

⁹⁹ *NLRB v. Service Trade Chauffeurs*, 199 F.2d 709, 22 CCH Lab. Cas. ¶ 67,230 (2d Cir. 1953).

to be told that it must stop picketing the premises after the "roving situs" has left, embarrasses or hinders the union not at all.

Of the other cases involving the Taft-Hartley Act's strike and boycott provisions,¹⁰⁰ attention need be directed specifically only to those in which it has been held that punitive damages may be imposed where the union action is even more than commonly wanton and egregious;¹⁰¹ those spelling out in factual detail the overwhelming economic coercion which a prepotent union leader may impose;¹⁰² and those dealing with the question whether the federal district courts are empowered to issue injunctive relief in suits by private parties. On the latter point it is to be noted that one federal district court has decided in the negative as to the strikes and boycotts prohibited by Section 303 of the Act,¹⁰³ while another has decided in the affirmative in a case under Section 301, dealing with violations of collective agreements.¹⁰⁴

Strikes and Boycotts under State Law.—This year as last the most significant cases were those which examined the inner workings of union boycotting techniques. It seems fair to say that one of the main trends in contemporary labor policy is toward isolating and narrowing the effects of labor disputes, at the same time that one of the tendencies of increasingly powerful labor unions in the complex, integrated American industrial system is to spread the impact of originally relatively minor labor disputes to a whole industry, a whole city, or even a whole region.

A union may have trouble imposing its will upon an employer through simple, direct strike action—action which is universally privileged—especially if the sentiments of that employer's employees are either with the employer or only moderately with the union. In these circumstances the union is likely to seek to add other pressures; and if the union happens to have monopoly power—as for example the Teamsters Union has—the external pressures of which it may avail itself can be tremendous. Thus in a dispute with Montgomery Ward and Company, the Union was able to impose so invulnerable a blockade that even so powerful a business as Ward was forced virtually

¹⁰⁰ E.g., *LeBaron v. Food Processors*, Local 10, 23 CCH Lab. Cas. ¶ 67,655 (S.D. Cal. 1953); *Penello v. Brewery & Beverage Drivers, IBT*, 23 CCH Lab. Cas. ¶ 67,590 (D.D.C. 1953).

¹⁰¹ *Patton v. United Mine Workers*, 24 CCH Lab. Cas. ¶ 67,835 (W.D. Va. 1953).

¹⁰² *Cosentino v. District Council of Ports of Puerto Rico*, 107 F. Supp. 235, 22 CCH Lab. Cas. ¶ 67,220 (D. Puerto Rico 1952); *Curto v. ILWU*, 107 F. Supp. 805, 22 CCH Lab. Cas. ¶ 67,286 (D. Ore. 1952).

¹⁰³ *Haspel v. Bonnaz*, 112 F. Supp. 944, 23 CCH Lab. Cas. ¶ 67,675 (S.D.N.Y. 1953).

¹⁰⁴ *Milk & Ice Cream Drivers Local 98 v. Gillespie Milk Products Corp.*, 203 F.2d 650, 23 CCH Lab. Cas. ¶ 67,518 (6th Cir. 1953).

to cease operations. The key to the blockade lay in the pressure which the Union was able to exert against the carriers whose services were essential to continued Ward operations. Having negotiated contracts with motor carriers pursuant to which employees were privileged to refuse to perform services in connection with any customer having a dispute of any kind with any labor union, the Teamsters secured the "co-operation" of the carriers in the dispute with Ward. The resulting pressure, the resulting damage to Ward, was tremendous. And Ward sued the carriers for damages (apparently no action was brought against the union), charging them with a conspiracy in violation of their common-law and statutory duty as common carriers to service all customers without discrimination.

This suit produced United States District Judge Fee's monumental opinion in *Montgomery Ward and Co. v. Northern Pacific Terminal Co.*¹⁰⁶ The defendants, besides the named Terminal Company, were a national railway express agency, five railroads, and forty-five motor carriers. And the judge held them all guilty of a collusive violation of their common-law and statutory duties as common carriers, in refusing to make all reasonable efforts to continue to service Ward during the labor dispute. In defense, the carriers advanced the "hot goods" contracts, as establishing a privilege against continuing services; they suggested also that they could not have compelled their employees to service Ward even if they had tried vigorously; that Ward itself had provoked the original dispute by its own unfair labor practice; and that, had they resisted the Teamsters request for co-operation, the effect would have been a complete transport tie-up, a much worse evil, according to the carriers, since the events took place in 1940-1941, when the nation was at war or preparing for war.

For Judge Fee a sufficient ground for decision lay in the fact that the law excuses nonperformance by a common carrier only on the basis of an act of God or of a public enemy, and that the union's action fell in neither category. This decision was fortified by elaborate research and documentation,¹⁰⁶ and most assiduous analysis. But the judge did not stop there. Carefully considering each of the special defenses, Judge Fee expressed himself as follows: (1) the duty of a common carrier is a publicly imposed duty, designed to protect the clients of common carriers, and it is therefore absurd to contend that the carriers may relieve themselves of such a duty by means of private contracts;¹⁰⁷ (2) the fact that employees might have refused to

¹⁰⁶ 23 CCH Lab. Cas. ¶ 67,713 (D. Ore. 1953). The decision occupies about thirty pages in the CCH Labor Law Reports.

¹⁰⁶ There are 105 footnotes, many of them of the kind associated with certain law review student notes.

¹⁰⁷ See the different view of the NLRB and of some other federal courts in cases under the Taft-Hartley Act, discussed in the preceding section of this survey.

perform services did not, in the first place, excuse the carriers from making every reasonable effort to compel them to do their work; and, in the second place, while injunctive relief may be unavailable under the Norris-LaGuardia Act to one in Ward's position during a labor dispute, it is available to parties in the position of the carriers,¹⁰⁸ and they should have at least attempted to avail themselves of such relief; (3) the duty of a common carrier reflects a public policy in no sense inferior to the national labor policy, and even though Ward might have been culpable in terms of the national labor policy, it did not thereby forfeit its right to the protection afforded by the laws concerning common carriers; nor could it be held that the existence of a labor dispute suspended the operation of the duty of the common carriers; (4) as to the carriers' contention that a refusal to acquiesce in the union's blockade would have caused an even more disastrous tie-up, it is necessary to quote Judge Fee at some length:

Of course, the fact that the assumed consequences were all illegal does not affect the smooth-flowing argument. Nor does the fact that the cooperation of the carriers was itself illegal and in violation of the basic principles upon which they hold sovereign powers deflect the stream. The answer is that each must have surrendered its franchise as a public office before yielding. . . .

The Court is of opinion that the carriers were not insensible of the fact that their actions in concert with the union leaders were illegal, but that they feared action in the courts would have caused them to be tied up so that they could not operate. They attempted to use a sort of informal "balance of convenience." They determined it would be less of an evil if Wards were discriminated against than if the Portland area were closed to traffic, since business and the government would then suffer also. This argument is not entirely disingenuous. The carriers feared seizure by the government in the event of war. And, in any event, they feared bankruptcy if there were a prolonged tie-up. Self-interest was, of course, the dominating motive.

However, the situation was not correctly appraised by them. Some of the unions involved had been severely disciplined not long before by the public in this state. Anything which brought the opinion of the people to bear upon them would have caused them to withdraw from indefensible and illegal positions. The evidence in this case proves the point. The unions took away the picket lines from the freight depots after these had been set up. When the proceedings were heard before the examiner of the [Interstate Commerce] Commission, the strike evaporated and was lost, for public opinion was brought to bear.

In any event, it was the duty of the carrier[s] to stand a strike or surrender up [their] operating franchise before joining in a conspiracy to destroy a business house with which they had no quarrel. If bankruptcy had been the result, then such is often the case where one

¹⁰⁸ See, e.g., *Louisville & N.R.R. v. Local 432, International Woodworkers*, 104 F. Supp. 748, 21 CCH Lab. Cas. ¶ 66,982 (S.D. Ala. 1952).

attempts to fulfill one's legal duties and responsibilities [citing numerous cases in point under the NLRA, and others involving carriers in similar situations]. . . .

The carriers violated their obligations by boycotting Wards and cutting it off from access of the facilities of commerce in order to stay in business themselves. It is only just that they should pay the damage to Wards.¹⁰⁹

Little more need be said here of Judge Fee's decision; its potential effect in terms of implementation of the national labor policy in favor of narrowing the impact of labor disputes is obvious. However, along with Judge Fee's decision, others which may help to stiffen the back of carriers against the demands of the Teamsters may be noted.¹¹⁰ Thus the Kentucky Court of Appeals held last year that carrier employees have an equal duty to continue to service customers during a labor dispute, a duty which may be enforced in equity.¹¹¹ Like Judge Fee, the Kentucky court ruled that a "hot goods" contract is ineffective to negate the carrier's duty.¹¹² Furthermore, according to the Kentucky court, the proviso to Section 8(b)(4) of the NLRA, declaring it not unlawful for an employee to refuse to cross the picket line of a majority union, is expressly limited to the NLRA and has no effect on state laws under which such a refusal may be found unlawful. Meanwhile, two decisions of the Texas Court of Civil Appeals also contributed to the immunization of carriers in labor disputes. In one, the Texas court declared that a railroad might have injunctive relief against the picketing of its right of way by a union during a dispute with an unrelated employer;¹¹³ and in the other it enjoined a union from inducing connecting carriers to refuse to deal with the carrier with whom the union was disputing.¹¹⁴

All in all the Teamsters' current campaign to "organize" "everything on wheels" is rolling along pretty smoothly on the tracks laid

¹⁰⁹ *Montgomery Ward and Co. v. Northern Pacific Terminal Co.*, 23 CCH Lab. Cas. ¶ 67,713, p. 84,056 (D. Ore. 1953).

¹¹⁰ See also *NLRB v. Rockaway News Supply Co.*, 345 U.S. 71 (1953), where the Supreme Court held that an employer might discharge an employee who had refused to perform those parts of his normal duties which required him to cross a picket line. However, in that case, it must be noted, the Court seemed to rely heavily upon the fact that the employee was working under a collective agreement which forbade all interruptions of employment.

¹¹¹ *General Drivers Local 89 v. American Tobacco Co.*, 258 S.W.2d 903, 23 CCH Lab. Cas. ¶ 67,693 (Ky. 1953).

¹¹² But see *Overton Co. v. IBT*, 24 CCH Lab. Cas. ¶ 67,803 (W.D. Mich. 1953) wherein District Judge Starr expressly differed with Judge Fee's decision as to the effect of a labor dispute upon the duty of carriers.

¹¹³ *Millmen Union, Local 324 v. Missouri-Kansas-Texas R.R.*, 253 S.W.2d 450, 22 CCH Lab. Cas. ¶ 67,260 (Tex. Civ. App. 1952).

¹¹⁴ *Truck Drivers Local 941 v. Whitfield Transportation, Inc.*, 259 S.W.2d 947, 23 CCH Lab. Cas. ¶ 67,719 (Tex. Civ. App. 1953).

by the NLRB under the Taft-Hartley Act, but it may have to proceed more circumspectly under the rules of the road established by the state and federal judges.

In less significant decisions, the state courts went along last year in normal fashion. A rather peculiar decision of the Pennsylvania Supreme Court, over a pungent dissent, held that a union representing employees at one plant could not be enjoined from extending its picketing to a second plant of the same employer, even though such picketing induced the employees there to quit work in violation of their collective agreement.¹¹⁵ At about the same time another Pennsylvania court was holding consistently with the precedents that a strike in violation of collective agreement is unlawful and enjoined in Pennsylvania,¹¹⁶ and a nearby Ohio court was holding that employees at one plant could not picket at a second one, where the employees there were working under a no-strike agreement.¹¹⁷

Other secondary picketing cases tussled with the fundamental absurdities of the "unity of interest" rule—a rule under which either all secondary action must be held privileged, since unions naturally extend their efforts only to employers who have an interest in common with the primary employer, or the decision limiting secondary action must be more or less arbitrary. Thus a painting subcontractor was given a judgment against a painters union which had induced a general contractor to cease dealing with the subcontractor because the latter had used a member of the carpenters union to do work which under some sort of ordinance "belonged" to painters.¹¹⁸ Again, it was held to be an enjoined "secondary boycott" for a union disputing with a juke-box lessor to picket the sites of lessees of the entertainment medium.¹¹⁹ And a union was enjoined from any sort of interference with certain department stores which had only vague relations with the department store management with which the union was primarily disputing.¹²⁰ In all but the last case, possibly, there was obviously a "unity of interest" between the primary and secondary employer, and still the picketing was enjoined.

¹¹⁵ *American Brake Shoe Co. v. District Lodge 9, IAM*, 94 A.2d 884, 23 CCH Lab. Cas. ¶ 67,397 (Pa. 1953).

¹¹⁶ *Philadelphia Transportation Co. v. Transport Workers Union*, 23 CCH Lab. Cas. ¶ 67,408 (Pa. C.P. 1952).

¹¹⁷ *Gulf Refining Co. v. Oil Workers Int'l Union*, 24 CCH Lab. Cas. ¶ 67,826 (Ohio C.P. 1953).

¹¹⁸ *Wagner v. Brotherhood of Painters*, 77 Pa. Dist. & Cir. Rep. 234, 22 CCH Lab. Cas. ¶ 67,214 (C.P. 1952).

¹¹⁹ *Wischhusen v. Griffin*, 23 CCH Lab. Cas. ¶ 67,683 (Md. Cir. Ct. 1953).

¹²⁰ *City Specialty Stores, Inc. v. Livingston*, 23 CCH Lab. Cas. ¶ 67,664 (N.Y. Sup. Ct. 1953), the same case holding at a later stage that the distribution of leaflets violated the terms of the decree. 24 CCH Lab. Cas. ¶ 67,777 and 24 CCH Lab. Cas. ¶ 67,789.

However, a union disputing with a retail optometry shop was permitted to picket a commonly owned and functionally related lens-grinding establishment.¹²¹ Product picketing was similarly allowed where confined, at the retail outlets, to the product of the "unfair" manufacturer.¹²² And the painters union was allowed to post pickets at sites where the advertising company with which the union had the primary dispute was putting up its signs.¹²³ The latter decision, it should be noted, was influenced considerably by NLRB "ambulatory situs" decisions.

Decisions passing upon the legality of various union objectives were extraordinarily few last year. In one of the two worth noting here, it was held that a union may not blacklist an employer who has refused to pay a fine imposed by a union tribunal to the jurisdiction of which he has never subjected himself.¹²⁴ In the second it was held that a union does not violate the Minnesota antitrust law by seeking to control hours of business—unless the union acts in concert with an employer group.¹²⁵

The Florida Supreme Court declared unconstitutional the state statute prohibiting strikes by public utility employees,¹²⁶ expressly rejecting the state attorney general's suggestion that the United States Supreme Court's similar decision¹²⁷ was so ill advised that the state court should give it the opportunity to review another statute imposing compulsory arbitration in public utility labor disputes. The Utah Supreme Court held unconstitutional as too vague a statute requiring all persons to register with the state industrial commission before taking employment with a firm whose employees were out on a strike called by a "national recognized union."¹²⁸

Jurisdictional Disputes.—In the federal courts no developments of any great importance occurred in connection with the law governing jurisdictional strikes and picketing. And the NLRB itself added nothing equal in significance to the decisions noted in last year's *Survey*. As to the state courts, the only decisions of any real

¹²¹ *Texas State Optical v. Optical Workers Union*, 257 S.W.2d 493, 23 CCH Lab. Cas. ¶ 67,521 (Tex. Civ. App. 1953).

¹²² *Galler v. Slurzberg*, 92 A.2d 89, 24 CCH Lab. Cas. ¶ 67,799 (N.J. App. Div. 1952).

¹²³ *Ohio Valley Advertising Corp. v. Local 207, Sign Painters*, 76 S.E.2d 113, 23 CCH Lab. Cas. ¶ 67,652 (W. Va. 1953).

¹²⁴ *Franklin v. Associated Musicians*, 120 N.Y.S.2d 31, 22 CCH Lab. Cas. ¶ 67,359 (Sup. Ct. 1953).

¹²⁵ *Red Owl Stores, Inc. v. Amalgamated Meat Cutters*, 109 F. Supp. 629, 22 CCH Lab. Cas. ¶ 67,374 (D. Minn. 1953).

¹²⁶ *Henderson v. Florida*, 65 So.2d 22, 23 CCH Lab. Cas. ¶ 67,584 (Fla. 1953).

¹²⁷ *Bus Employees v. Wisconsin Employment Relations Board*, 340 U.S. 383 (1951).

¹²⁸ *Utah v. Packard*, 250 P.2d 561, 22 CCH Lab. Cas. ¶ 67,283 (Utah 1952).

significance were those of the California courts, which upheld the constitutionality of the state jurisdictional-disputes statute and, in a relatively large number of decisions, clarified the scope and application of that statute.¹²⁰

Featherbedding and Union Make-Work Programs.—In terms of publicity, the United States Supreme Court decisions interpreting the so-called "featherbedding" provisions¹²⁰ of the Taft-Hartley Act were decidedly important. But in terms of substantial effect on uneconomic union activities, the high Court's decisions are scarcely worth mentioning. The two decisions,¹²¹ over substantial dissents,¹²² held that the statutory provision in question affects not at all union make-work programs, even the kind which Congress was specifically considering at the time the statute was passed. More important was the decision of a Michigan court which held, after a careful examination of all the available relevant evidence, that the painters union's efforts to block the use of paint rollers had no visible relation to "wages, hours of employment, health, safety, the right of collective bargaining, or any other condition of employment or for the protection of the workmen from labor abuses"—and that, therefore, an injunction should issue against such efforts.¹²³

Perhaps the item most worthy of special mention was Benjamin Aaron's penetrating scholarly article "Governmental Restraints on Featherbedding."¹²⁴ Mr. Aaron concludes that a frontal attack on specific "featherbedding" practices misconceives the nature of the problem and is scarcely likely to achieve the socially desirable result of elimination of waste of manpower and resources. According to Mr. Aaron, concentration on the *means* utilized to impose such waste is theoretically sounder and more likely to yield desirable practical

¹²⁰ *In re Kelleher*, 254 P.2d 572, 23 CCH Lab. Cas. ¶ 67,452; *Isthmian S.S. Co. v. National Marine Engineers Beneficial Ass'n*, 254 P.2d 578, 23 CCH Lab. Cas. ¶ 67,453; *Seven-Up Bottling Co. v. Grocery Drivers Union*, 254 P.2d 544, 23 CCH Lab. Cas. ¶ 67,450; *Sommer v. Metal Trades Council*, 254 P.2d 559, 23 CCH Lab. Cas. ¶ 67,455; *Voeltz v. Bakery & Confectionery Workers*, 254 P.2d 553, 23 CCH Lab. Cas. ¶ 67,451. These are all decisions of the California Supreme Court during 1953.

¹²⁰ 61 Stat. 142 (1947), 29 U.S.C. § 158(b)(6) (Supp. 1952).

¹²¹ *American Newspaper Publishers Ass'n v. NLRB*, 345 U.S. 100 (1953); *NLRB v. Gamble Enterprises*, 345 U.S. 117 (1953). The former holding that the requirement that union workers be paid for setting "bogus" type, and the latter holding that a similar requirement that an employer pay musicians for a performance which he did not wish, did not violate the Taft-Hartley Act since in each instance the union offered "services" in return for the payment exacted.

¹²² The late Chief Justice Vinson and Mr. Justice Clark dissented in both cases, while Mr. Justice Douglas dissented in the typesetting case and Mr. Justice Jackson in the musicians case.

¹²³ *Augstin v. Painters' District Council*, 24 CCH Lab. Cas. ¶ 67,818 (Mich. Cir. Ct. 1953).

¹²⁴ 5 Stan. L. Rev. 680 (1953).

results.¹⁸⁵ The present writer has elsewhere expressed endorsement of that approach.¹⁸⁶

Union Refusal to Bargain.—Here, too, important new developments were virtually nonexistent. One case alone need be mentioned, a case in which the third circuit affirmed an NLRB decision to the effect that a union's insistence upon bargaining for or in relation to supervisory work exempted by the Act from the category of employee activity amounts to a refusal to bargain in good faith.¹⁸⁷

III

EMPLOYER UNFAIR LABOR PRACTICES

The volume of cases involving alleged unfair labor practices of employers continues large. And again the issue most often raised has been whether or not the findings of the NLRB accord with the mandate of Section 10(e) that they be "supported by substantial evidence on the record considered as a whole." There have been, however, a number of decisions presenting important questions of law. While few of these questions can be termed "novel," many of the cases reflect significant extensions or modifications of familiar principles.

Interference, Restraint and Coercion.—Section 8(a)(1) proscribes employer interference, restraint and coercion of employees in the exercise of the rights guaranteed in Section 7. Like other unfair labor practice provisions, however, this section must be read in conjunction with Section 8(c), which provides that an expression of opinion shall not be evidence of an unfair labor practice if it contains no threat of reprisal or promise of benefit.

One of the most vexed problems involving these provisions is the status of interrogation of employees concerning their union membership or activities. The NLRB often has stated that it regards such interrogation as a *per se* violation of Section 8(a)(1).¹⁸⁸ This view, however, has by no means compelled universal acceptance among the reviewing courts. While there is some judicial authority which supports the Board's position,¹⁸⁹ other courts, perhaps a majority, have rejected

¹⁸⁵ *Id.* at 718-21.

¹⁸⁶ Petro, *The External Significance of Internal Union Affairs*, N.Y.U. Fourth Annual Conference on Labor 339 (1951); Petro, *On Amending the Taft-Hartley Act*, 4 Lab. L.J. 67, 155 (1953).

¹⁸⁷ *NLRB v. Retail Clerks*, 203 F.2d 165, 23 CCH Lab. Cas. ¶ 67,520 (9th Cir. 1953).

¹⁸⁸ E.g., 17 N.L.R.B. Ann. Rep. 110 (1952); *Standard-Coosa-Thatcher Co.*, 85 N.L.R.B. 1358 (1949).

¹⁸⁹ E.g., *NLRB v. Minnesota Mining & Mfg. Co.*, 179 F.2d 323, 17 CCH Lab. Cas. 65,529 (8th Cir. 1950); *NLRB v. Jackson Press, Inc.*, 201 F.2d 541, 22 CCH Lab. Cas. ¶ 67,371 (7th Cir. 1953); cf. *NLRB v. Cold Spring Granite Co.*, 24 CCH Lab. Cas. ¶ 67,908 (8th Cir. 1953).

the *per se* doctrine and have refused to enforce NLRB orders based upon interrogation unaccompanied by threats of reprisal or promises of benefit.¹⁴⁰ One such decision¹⁴¹ seems particularly significant in the light of the trend in the state courts to enjoin minority or stranger picketing for recognition. In this case, an employer, whose stores were being picketed by a union to compel recognition, sought an injunction in the courts of Missouri, which hold that minority picketing for recognition is enjoinable. To establish the fact that the union did not possess majority status, the employer submitted to his employees a form of affidavit reciting that the signer was not a union member and had not authorized the union to represent him. The employees were asked to read it and sign it or not sign it, as they wished; nothing more was said to them. Although the NLRB has permitted a "narrowly applied" exception to its rule against interrogation where necessary to prepare for trial, it held that the exception did not apply in this case, largely because of the absence of any explanation by the employer of the purpose of the affidavits. The eighth circuit, however, set aside the Board's order, stating that "any legally proper evidential interrogation, as a matter of competent affidavit, deposition or witness-chair testimony, within the issues of the case and wholly for purposes thereof, cannot be held to be an unfair labor practice under the Act, no matter what its incidental consequences, if any, may chance to be."¹⁴²

Does Section 8(c), the "free speech" provision of the NLRA, privilege an employer to express his preference for one of two rival unions engaged in an organizational campaign among his employees? An affirmative answer is found in *NLRB v. Corning Glass Works*,¹⁴³ in which the court rejected the argument that the employer must maintain "strict neutrality" in such circumstances, stating that neither the First Amendment nor Section 8(c) draws any distinction between the scope of an employer's right to express his views when his employees are considering whether or not to unionize and when they are deciding to join one union or another. Although another court has observed that an employer "must maintain a strictly neutral attitude"

¹⁴⁰ *NLRB v. England Bros., Inc.*, 201 F.2d 395, 22 CCH Lab. Cas. ¶ 67,385 (1st Cir. 1953); *NLRB v. Clearwater Finishing Co.*, 203 F.2d 938, 23 CCH Lab. Cas. ¶ 67,577 (4th Cir. 1953); *Wayside Press, Inc. v. NLRB*, 206 F.2d 862, 24 CCH Lab. Cas. ¶ 67,805 (9th Cir. 1953); *NLRB v. Fuchs Baking Co.*, 24 CCH Lab. Cas. ¶ 67,929 (5th Cir. 1953). There has been a recent indication that the NLRB may be prepared to depart from the doctrine that interrogation is a *per se* violation. *The Walmac Co.*, 106 N.L.R.B. No. 244 (Oct. 29, 1953).

¹⁴¹ *NLRB v. Katz Drug Co.*, 207 F.2d 168, 24 CCH Lab. Cas. ¶ 67,838 (8th Cir. 1953).

¹⁴² *Id.* at 172.

¹⁴³ 204 F.2d 422, 23 CCH Lab. Cas. ¶ 67,619 (1st Cir. 1953).

in the latter circumstances and upheld the NLRB's finding of illegal assistance to one of two rival unions, its rejection of the "free speech" argument was based upon findings that the employer's expressions of preference were combined with threats of reprisal and were part of a larger pattern of hostility to one union and active assistance to the rival.¹⁴⁴

In 1952 the second circuit decided the important *Bonwit Teller* case,¹⁴⁵ in which it agreed with the NLRB that if the operator of a retail department store chooses to avail himself of the privilege of banning union solicitation within the selling areas of the store during both working and nonworking hours, it is an unfair labor practice for him to utilize the same premises for the purpose of making a pre-election argument against unionization while denying the union an opportunity to reply. The court, however, rejected the NLRB's alternative basis of decision, that even in the absence of the no-solicitation rule, it is illegal so to address employees if the employer has refused to allow a similar opportunity to the union. This year, in *NLRB v. American Tube Bending Co.*,¹⁴⁶ the same court applied its *Bonwit Teller* rule to a manufacturing plant in which the company had promulgated a rule against all solicitation on its premises. The court noted that in such circumstances *two* unfair labor practices were involved: (1) unlike a retail store, it was illegal to ban solicitation in a manufacturing plant during nonworking hours; (2) it was also illegal to address the employees while such a rule was in effect.

Another chapter has been written during the past year in the protracted litigation involving the question whether, when a union strikes an individual member of a multiemployer bargaining unit following an impasse in negotiations, the other employers may resort to a temporary lockout. The 1951 *Survey*¹⁴⁷ discussed in detail the *Morand* case, in which the seventh circuit stated that while it would be illegal for the employers to *discharge* the employees,¹⁴⁸ it would be legal to lay off, suspend, or lock out the employees. The court remanded the case to the NLRB to determine *inter alia* whether the employers' conduct was an illegal discharge or a valid lockout. Last

¹⁴⁴ *NLRB v. Ronney*, 206 F.2d 730, 24 CCH Lab. Cas. ¶ 67,807 (9th Cir. 1953).

¹⁴⁵ *Bonwit Teller, Inc. v. NLRB*, 195 F.2d 640, 21 CCH Lab. Cas. ¶ 67,025 (2d Cir. 1952).

¹⁴⁶ 205 F.2d 45, 23 CCH Lab. Cas. ¶ 67,671 (2d Cir. 1953).

¹⁴⁷ 1951 Annual Surv. Am. L. 338-40.

¹⁴⁸ Similarly, it again has been held that while an employer is privileged to replace employees who have struck for economic reasons unrelated to unfair labor practices, it is an unfair labor practice to discharge them before replacement. *NLRB v. United States Cold Storage Corp.*, 203 F.2d 924, 23 CCH Lab. Cas. ¶ 67,547 (5th Cir. 1953); *NLRB v. Buzza-Cardozo*, 205 F.2d 889, 23 CCH Lab. Cas. ¶ 67,741 (9th Cir. 1953).

year's *Survey* noted the ninth circuit's agreement with the seventh circuit's view that such a temporary lockout is not unlawful, and the NLRB's disagreement in the proceedings upon remand in both cases.¹⁴⁹ This year both circuits have reviewed the NLRB's supplemental orders. In *Morand*, the court enforced the NLRB's order on the ground that there was substantial evidence to support the Board's finding of an illegal discharge, but left no doubt that it still adheres to the view that a temporary lockout would have been justified.¹⁵⁰ In the second case, in which it was undisputed that a temporary lockout rather than a discharge was involved, the ninth circuit also maintained its previous position and set aside the Board's order.¹⁵¹

Discrimination.—The numerous cases relating to discrimination within the meaning of Section 8(a)(3) disclose little in the way of novel doctrine. It has been reiterated that it is an unfair labor practice to make membership in a particular union a condition of hiring employees.¹⁵² The layoff of employees resulting from a shut-down designed to frustrate union organization likewise is illegal.¹⁵³ Again, the plea of economic necessity caused by union pressures has been rejected as a defense to a discharge for union considerations.¹⁵⁴ Although supervisors are not "employees" within the meaning of the NLRA, it is an unlawful discrimination to refuse a nonsupervising employee a promotion to a supervisory position because of the exercise of his statutory right to refrain from engaging in union activity.¹⁵⁵

As a logical corollary of the rule that individual contracts of employment cannot forestall the employer's duty to bargain collectively with a representative duly designated under the NLRA,¹⁵⁶ the fifth circuit has held that it is an unfair labor practice to discharge employees for a refusal to execute individual contracts after the selection of a statutory representative.¹⁵⁷

Protected Concerted Activity.—Section 7 of the NLRA guarantees employees the right, among others, to engage in "concerted activities

¹⁴⁹ 1952 Annual Surv. Am. L. 260, 28 N.Y.U.L. Rev. 291 (1953).

¹⁵⁰ *Morand Bros. Beverage Co. v. NLRB*, 204 F.2d 529, 23 CCH Lab. Cas. ¶ 67,624 (7th Cir. 1953).

¹⁵¹ *Leonard v. NLRB*, 205 F.2d 355, 23 CCH Lab. Cas. ¶ 67,689 (9th Cir. 1953).

¹⁵² *NLRB v. Cantrall*, 201 F.2d 853, 23 CCH Lab. Cas. ¶ 67,399 (9th Cir.), cert. denied, 345 U.S. 996 (1953); *NLRB v. Swinerton*, 202 F.2d 511, 23 CCH Lab. Cas. ¶ 67,428 (9th Cir. 1953).

¹⁵³ *NLRB v. Norma Mining Corp.*, 24 CCH Lab. Cas. ¶ 67,746 (4th Cir. 1953).

¹⁵⁴ *NLRB v. Pappas & Co.*, 203 F.2d 569, 23 CCH Lab. Cas. ¶ 67,557 (9th Cir. 1953).

¹⁵⁵ *NLRB v. Bell Aircraft Corp.*, 24 CCH Lab. Cas. ¶ 67,782 (2d Cir. 1953).

¹⁵⁶ *J. I. Case Co. v. NLRB*, 321 U.S. 332 (1944).

¹⁵⁷ *NLRB v. Stewart*, 207 F.2d 8, 24 CCH Lab. Cas. ¶ 67,820 (5th Cir. 1953).

for the purpose of collective bargaining or other mutual aid or protection." In the absence of fuller definition of the term "concerted activities," it is the task of the NLRB and the reviewing courts to determine the forms of activity which are protected against interference and discrimination, and those which are unprotected.

The problem of whether a refusal to cross a picket line is a protected concerted activity, discussed in the 1951 and 1952 *Surveys*,¹⁵⁸ was presented to the Supreme Court of the United States during the past year. In the *Rockaway News* case¹⁵⁹ the company discharged a truck driver who refused to cross a picket line to pick up newspapers at a struck plant. The picket line was that of a union other than his own and the reason given by the discharged employee for refusing to perform his regular duty was that he did not want to become a "scab." The Court affirmed the second circuit's holding that the discharge was not an unfair labor practice, but did so on other grounds. The company and the employee's statutory representative had executed a collective contract containing a no-strike clause which, if valid, would have concededly provided justification for the discharge. The NLRB, however, had held the entire contract illegal because it contained a union-security clause which exceeded the limits permitted by the proviso in Section 8(a)(3). The Supreme Court held that the Board's complete disregard of the contract was error because (1) "even if inclusion of a forbidden provision is enough to justify the Board in setting it aside as to the future, it does not follow that it can be wholly ignored in judging events that occurred before it was set aside,"¹⁶⁰ and (2) the Board's position ignored the fact that the forbidden union-security provision could be and was severed in the contract. Thus, the no-strike clause justified the discharge, and we must await another day for what the Court termed "decision of sweeping abstract principles as to the respective rights of employer and employee regarding picket lines."¹⁶¹

Two legal facets of the *Rockaway News* litigation received attention in other cases. The ninth circuit has held that it is illegal to discharge an employee for refusing to cross a picket line of his fellow employees who had gone on strike.¹⁶² And both the NLRB and the courts have held that an employer ordinarily is free to discharge or otherwise discriminate against employees for engaging

¹⁵⁸ 1951 Annual Surv. Am. L. 338; 1952 Annual Surv. Am. L. 261, 28 N.Y.U.L. Rev. 292 (1953).

¹⁵⁹ NLRB v. Rockaway News Supply Co., 345 U.S. 71 (1953).

¹⁶⁰ Id. at 76-77.

¹⁶¹ Id. at 75.

¹⁶² NLRB v. West Coast Casket Co., 205 F.2d 902, 23 CCH Lab. Cas. ¶ 67,712 (9th Cir. 1953).

in a strike or other concerted activity in breach of a collective contract.¹⁶³ But the NLRB has refused to extend this doctrine to a situation in which, although a contract containing a no-strike clause was present, the strike was caused by "serious" unfair labor practices unrelated to the provisions of the contract.¹⁶⁴ In the same case, the Board also held that Section 8(d) of the Taft-Hartley Act, which prohibits strikes and lockouts during a sixty-day period following notice of termination or modification of an existing contract, has no application to strikes caused by unfair labor practices unconnected with problems of contract termination or modification.

The second circuit has denied enforcement of NLRB orders in two important cases. In the first, *NLRB v. Office Towel Supply Co.*,¹⁶⁵ a group of employees during a recess discussed their dissatisfaction with working conditions and concluded that a union was needed. One of them remarked, "This is a hell of a place to work. They expect one girl to do the work of five and a girl doesn't get time to go to the ladies' room." Later that day the company's president, having learned of the remark, but knowing nothing more of the nature or contents of the group discussion, discharged the employee. The court held that "mere griping" to other employees is not a protected concerted activity, and that although the group discussion concerning unionization was protected, it could not be said that the employee was discharged because of her participation, since the employer had no knowledge of the context of her remark. In the second case, *NLRB v. Electronics Equipment Co.*,¹⁶⁶ the court held that certain union activity designed to compel exclusive recognition as representative of employees whom another union claimed to represent in a proceeding pending before the NLRB was not protected since it sought to induce an illegal act by the employer.

Other cases for the most part reflect application of established principles. Thus, it has been held that engaging in a sitdown strike,¹⁶⁷ picketing in such fashion as to debar company officials and non-striking employees from entering a struck plant,¹⁶⁸ and the use of violence against nonstriking employees,¹⁶⁹ are not protected activities. The fourth circuit has extended the same doctrine to encompass the

¹⁶³ *NLRB v. National Die Casting Co.*, 207 F.2d 344, 24 CCH Lab. Cas. ¶ 67,867 (7th Cir. 1953); *Wagner Electric Corp.*, 105 N.L.R.B. No. 3 (May 26, 1953).

¹⁶⁴ *Mastro Plastics Corp.*, 103 N.L.R.B. No. 51 (March 13, 1953); cf. *National Electric Products Corp.*, 80 N.L.R.B. 995 (1948).

¹⁶⁵ 201 F.2d 838, 22 CCH Lab. Cas. ¶ 67,326 (2d Cir. 1953).

¹⁶⁶ 205 F.2d 296, 23 CCH Lab. Cas. ¶ 67,687 (2d Cir. 1953).

¹⁶⁷ Administrative Decision of NLRB General Counsel, Case No. 821 (Oct. 9, 1953).

¹⁶⁸ *Victor Products Corp. v. NLRB*, 23 CCH Lab. Cas. ¶ 67,736 (D.C. Cir. 1953).

¹⁶⁹ *NLRB v. Longview Furniture Co.*, 24 CCH Lab. Cas. ¶ 67,763 (4th Cir. 1953).

use of "insulting and profane language calculated and intended to publicly humiliate employees who are attempting to work."¹⁷⁰ In reliance upon the leading *Draper* case,¹⁷¹ two cases have held that strike activity by a minority of the members of a statutory representative, independently seeking to achieve improved conditions, is not a protected activity, as it is destructive of the statutory procedures of collective bargaining through majority representatives.¹⁷² On the other hand, a one-day strike to gain declared ends, unlike a partial strike, is within the protection of the NLRA.¹⁷³ In addition to this typical strike activity, it was recognized that activities such as acting as spokesman for a group of employees who sought a bonus for night work,¹⁷⁴ dissolving an independent union,¹⁷⁵ and organizing a movement to secure employees' rights under the Fair Labor Standards Act,¹⁷⁶ are protected against employer interference. And lawful concerted activities of employees are not denied protection because they are intended to support a union which has not complied with the filing and affidavit requirements of Section 9(f), (g) and (h).¹⁷⁷

Refusal to Bargain.—Sections 8(a)(5) and 8(d) make it an unfair labor practice for an employer to refuse to bargain in good faith with the representative designated by a majority of his employees in an appropriate unit. Although an employer cannot be held to have violated Section 8(a)(5) in the absence of a request to bargain, he is nevertheless guilty of violating Section 8(a)(1) if he bargains individually with his employees at a time when he is aware of a union's majority status.¹⁷⁸ A literal refusal to bargain is privileged when based upon the employer's honest doubt as to the representative's majority status or as to the appropriate bargaining unit.¹⁷⁹ But an employer's claim of good faith is rejected where he indulges in

¹⁷⁰ *Ibid.*

¹⁷¹ *NLRB v. Draper Corp.*, 145 F.2d 199 (4th Cir. 1944).

¹⁷² *NLRB v. American Mfg. Co. of Texas*, 203 F.2d 212, 23 CCH Lab. Cas. ¶ 67,517 (5th Cir. 1953); *Harnischfeger Corp. v. NLRB*, 207 F.2d 575, 24 CCH Lab. Cas. ¶ 67,895 (7th Cir. 1953).

¹⁷³ *NLRB v. Buzza-Cardozo*, 205 F.2d 889, 23 CCH Lab. Cas. ¶ 67,741 (9th Cir. 1953).

¹⁷⁴ *NLRB v. Martin*, 207 F.2d 655, 24 CCH Lab. Cas. ¶ 67,899 (9th Cir. 1953).

¹⁷⁵ *NLRB v. Coal Creek Coal Co.*, 204 F.2d 579, 23 CCH Lab. Cas. ¶ 67,579 (10th Cir. 1953).

¹⁷⁶ *Salt River Valley Water Users' Ass'n v. NLRB*, 24 CCH Lab. Cas. ¶ 67,759 (9th Cir. 1953); *NLRB v. Moss Planning Mill Co.*, 206 F.2d 557, 24 CCH Lab. Cas. ¶ 67,764 (4th Cir. 1953).

¹⁷⁷ *NLRB v. Coal Creek Coal Co.*, 204 F.2d 579, 23 CCH Lab. Cas. ¶ 67,579 (10th Cir. 1953).

¹⁷⁸ *Zall v. NLRB*, 202 F.2d 499, 23 CCH Lab. Cas. ¶ 67,478 (9th Cir. 1953).

¹⁷⁹ *NLRB v. Jackson Press, Inc.*, 201 F.2d 541, 22 CCH Lab. Cas. ¶ 67,371 (7th Cir. 1953); *Union Carbide and Carbon Corp.*, 105 N.L.R.B. No. 57 (June 8, 1953).

contemporaneous unfair labor practices or other conduct designed to destroy the majority status of the representative.¹⁸⁰

Several decisions of the reviewing courts have been concerned with the validity of the NLRB's rule that, "absent unusual circumstances, the majority status of a certified union is presumed to continue for 1 year from the date of certification."¹⁸¹ Although some of the circuit courts have enforced orders based upon this doctrine,¹⁸² the sixth circuit consistently has refused to give conclusive effect to a certification where there is persuasive evidence as to change of employee sentiment uninfluenced by unfair labor practices.¹⁸³

The duty to bargain with the statutory representative is not suspended by the filing of unfair labor practice charges or by the occurrence of a lawful strike.¹⁸⁴ Indeed, while an employer is not required to "engage in futile bargaining" in the face of a genuine impasse in negotiations, when the impasse is broken by a strike the duty to bargain upon request resumes.¹⁸⁵

Although certain conduct, such as the refusal to furnish information on bargainable matters¹⁸⁶ and individual dealing or unilateral action,¹⁸⁷ itself may be violative of Section 8(a)(5), the ultimate determination of whether an employer has bargained in "good faith" frequently requires an evaluation of the employer's entire course of dealing. An excellent analysis of the legal and factual issues involved

¹⁸⁰ NLRB v. Howell Chevrolet Co., 204 F.2d 79, 23 CCH Lab. Cas. ¶ 67,431 (9th Cir. 1953); NLRB v. Charles R. Krimm Lumber Co., 203 F.2d 194, 23 CCH Lab. Cas. ¶ 67,515 (2d Cir. 1953); NLRB v. Epstein, 203 F.2d 482, 23 CCH Lab. Cas. ¶ 67,526 (3d Cir. 1953); Smith Transfer Co. v. NLRB, 204 F.2d 738, 23 CCH Lab. Cas. ¶ 67,635 (5th Cir. 1953); NLRB v. Stewart, 207 F.2d 8, 24 CCH Lab. Cas. ¶ 67,820 (5th Cir. 1953); NLRB v. Poultry Enterprises, 207 F.2d 522, 24 CCH Lab. Cas. ¶ 67,934 (5th Cir. 1953).

¹⁸¹ Celanese Corp. of America, 95 N.L.R.B. 664, 671-72 (1951).

¹⁸² E.g., NLRB v. Brooks, 204 F.2d 899, 23 CCH Lab. Cas. ¶ 67,608 (9th Cir. 1953); NLRB v. White Construction and Engineering Co., 204 F.2d 950, 23 CCH Lab. Cas. ¶ 67,649 (5th Cir. 1953).

¹⁸³ Mid-Continent Petroleum Corp. v. NLRB, 204 F.2d 613, 23 CCH Lab. Cas. ¶ 67,623 (6th Cir.), cert. denied, 74 Sup. Ct. 71 (1953); cf. NLRB v. Reeder Motor Co., 202 F.2d 802, 23 CCH Lab. Cas. ¶ 67,504 (6th Cir. 1953).

¹⁸⁴ NLRB v. Harris, 200 F.2d 656, 22 CCH Lab. Cas. ¶ 67,325 (5th Cir. 1953); NLRB v. Jones Furniture Mfg. Co., 200 F.2d 774, 22 CCH Lab. Cas. ¶ 67,345 (8th Cir. 1953); NLRB v. Taormina, 207 F.2d 251, 24 CCH Lab. Cas. ¶ 67,836 (5th Cir. 1953).

¹⁸⁵ NLRB v. United States Cold Storage Corp., 203 F.2d 924, 23 CCH Lab. Cas. ¶ 67,547 (5th Cir. 1953).

¹⁸⁶ NLRB v. Leland-Gifford Co., 200 F.2d 620, 22 CCH Lab. Cas. ¶ 67,303 (1st Cir. 1952); NLRB v. Hekman Furniture Co., 207 F.2d 563, 24 CCH Lab. Cas. ¶ 67,874 (6th Cir. 1953) (wage data); Brown Truck and Trailer Mfg. Co., 106 N.L.R.B. No. 158 (Aug. 26, 1953) (plant removal).

¹⁸⁷ E.g., NLRB v. Harris, 200 F.2d 656, 22 CCH Lab. Cas. ¶ 67,325 (5th Cir. 1953); NLRB v. Century Cement Mfg. Co., 24 CCH Lab. Cas. ¶ 67,935 (2d Cir. 1953).

in such circumstances may be found in the opinion of Chief Judge Magruder of the first circuit in *NLRB v. Reed & Prince Mfg. Co.*¹⁸⁸

The important question of the subject matter of compulsory negotiation was litigated only to a limited extent during the past year. Two cases raised the issue of whether occupancy and rental of company housing is an appropriate subject of collective bargaining. While differing in result, there was substantial agreement in principle: if rents are so low that occupancy constitutes a portion of the employees' pay, or if occupancy is required as an express condition of employment or because of the lack of other available housing, such housing is a "condition of employment" within the meaning of the statute.¹⁸⁹ But in the absence of such factors, the result is otherwise.¹⁹⁰

Perhaps the most significant decision of the year involving the statutory duty to bargain was that of the District of Columbia circuit in *West Texas Utilities Co. v. NLRB*.¹⁹¹ In 1949, the second circuit, speaking through Judge Learned Hand in *Doubs v. Local 1250*,¹⁹² announced the proposition, which it limited to dictum on application for rehearing, that the Taft-Hartley amendments to the "grievance" proviso in Section 9(a) meant in substance that even though the employees had selected a statutory representative, it was legal for individual or minority groups, and a rival union on their behalf, to bargain with the employer concerning all appropriate subjects of collective bargaining which had not been covered by a contract or otherwise bargained out by the statutory representative and the employer. The *Doubs* opinion excited much adverse criticism,¹⁹³ but so far as appears, the dictum was not put to further test in the courts until the *West Texas Utilities* decision. In that case, the court previously had enforced an order of the NLRB requiring an employer to bargain with a specified union "as the exclusive representative" of employees within the appropriate unit "with respect to wages, rates of pay" and other conditions of employment. The employer and the union were unable to reach any agreement, but the employer subsequently negotiated a wage increase for most employees with an attorney who had no connection with the union but claimed to represent

¹⁸⁸ 205 F.2d 131, 23 CCH Lab. Cas. ¶ 67,663 (1st Cir. 1953). See also *NLRB v. Taormina*, 207 F.2d 251, 24 CCH Lab. Cas. ¶ 67,836 (5th Cir. 1953).

¹⁸⁹ *NLRB v. Lehigh Portland Cement Co.*, 24 CCH Lab. Cas. ¶ 67,748 (4th Cir. 1953).

¹⁹⁰ *NLRB v. Bemis Bros. Bag Co.*, 24 CCH Lab. Cas. ¶ 67,771 (5th Cir. 1953).

¹⁹¹ 206 F.2d 442, 23 CCH Lab. Cas. ¶ 67,554 (D.C. Cir.), cert. denied, 74 Sup. Ct. 70 (1953).

¹⁹² 173 F.2d 764 (2d Cir. 1949).

¹⁹³ See, e.g., Dunau, *Employee Participation in the Grievance Aspect of Collective Bargaining*, 50 Col. L. Rev. 731 (1950).

a large number of individual employees. In proceedings brought by the NLRB, the court adjudged the employer guilty of contempt. The court rejected the *Doubs* dictum that the proviso in Section 9(a) had "put an end to the distinction between 'grievances' and other disputes." It reasoned, relying largely upon the Supreme Court's decision under the Railway Labor Act in the *Elgin* case,¹⁹⁴ that "grievances" usually referred to "secondary disputes in contrast to disagreements concerning broad issues such as rates, hours, and working conditions"; that this was the prevailing view under the Wagner Act and that nothing in the legislative history of Taft-Hartley reflected congressional intent to give the term "grievances" in Section 9(a) a different meaning; that the *Doubs* rationale would tend to abrogate the very rights bestowed by the dominant portion of Section 9(a) and protected by Sections 8(a)(5) and 8(b)(4)(c); and that therefore the fixing of wages or rates of pay was not the adjustment of "grievances" protected by the proviso in Section 9(a). If, as seems not unlikely, this interpretation of the amended proviso should prevail, it will mean that the majority rule principle developed under the Wagner Act by the NLRB and the courts will have remained substantially intact under the Taft-Hartley Act.¹⁹⁵

Remedial Action.—Last year's *Survey* discussed the NLRB's new back-pay formula under which it is the practice to compute back pay on a quarterly (three-month) basis rather than on the basis of the entire period between discharge and offer of reinstatement.¹⁹⁶ During the past year the Supreme Court, reversing the fifth circuit's decision in *NLRB v. Seven-Up Bottling Company*,¹⁹⁷ held that the Board had authority to adopt this formula as a general method of computation, but cautioned that it was the Board's duty, when the issue is properly raised, to consider and evaluate circumstances which might make its application oppressive, and to fashion its order accordingly.

The sixth circuit has enforced an order in which the NLRB, pursuant to Taft-Hartley amendments in Section 10(c), for the first time required the "disestablishment" of a local union affiliated with one of the national federations.¹⁹⁸

¹⁹⁴ *Elgin, Joliet & Eastern Ry. v. Burley*, 325 U.S. 711 (1945).

¹⁹⁵ See Weyand, *Majority Rule in Collective Bargaining*, 45 Col. L. Rev. 556 (1945); Weyand, *The Scope of Collective Bargaining Under the Taft-Hartley Act*, N.Y.U. First Annual Conf. on Labor 257 (1948).

¹⁹⁶ 1952 Annual Surv. Am. L. 263, 28 N.Y.U.L. Rev. 294 (1953).

¹⁹⁷ 344 U.S. 344 (1953), reversing 196 F.2d 424 (5th Cir. 1953).

¹⁹⁸ *NLRB v. Jack Smith Beverages, Inc.*, 202 F.2d 100, 23 CCH Lab. Cas. ¶ 67,405 (6th Cir.), cert. denied, 345 U.S. 995 (1953). The court, however, limited application of the NLRB order, which had required disestablishment of the local union at the three plants operated by the employer, to the one plant where the unfair labor practices had occurred.

IV

RAILWAY LABOR ACT

There continues to be considerable litigation concerning the respective jurisdictions of the courts and the agencies created by the Railway Labor Act (RLA) in disputes between employers and employees. In 1950, the Supreme Court indicated in the *Slocum* case¹⁹⁹ that while the National Railway Adjustment Board (NRAB) ordinarily has exclusive primary jurisdiction over disputes concerning the interpretation of collective agreements, there is an exception in cases in which an employee seeks damages in a common-law action for wrongful discharge. The Court has clarified the nature of the exception during the past year in *Transcontinental & Western Air, Inc. v. Koppal*.²⁰⁰ This was a diversity action brought in a federal district court against a carrier subject to the RLA. Plaintiff sought judgment for damages resulting from an alleged wrongful discharge in breach of an employment contract executed and to be performed in Missouri. The terms of the employment contract were embodied in a collective agreement containing disputes-adjustment procedures comparable to those provided in the RLA. The Court upheld the district court's action in dismissing the complaint on the ground that plaintiff had failed to exhaust his contractual remedies as required by the law of Missouri. In so ruling, the Court made plain that the RLA does not preclude a state-recognized cause of action for damages for wrongful discharge, and that in such action state law is controlling as to whether or not there must be an exhaustion of contractual administrative remedies, even though such remedies involve the very administrative procedure contemplated by the RLA.²⁰¹

As previously noted, the RLA's new union-shop provision has been held constitutional,²⁰² and superior to state "right to work" laws.²⁰³ And it also has been held that union security is a "working

¹⁹⁹ *Slocum v. Delaware, L. & W.R.R.*, 339 U.S. 239 (1950), discussed in 1950 Annual Surv. Am. L. 362-65.

²⁰⁰ 345 U.S. 653 (1953).

²⁰¹ Other decisions involving jurisdictional questions arising under the RLA are the following: *O'Donnell v. Pan American World Airways, Inc.*, 200 F.2d 929, 22 CCH Lab. Cas. ¶ 67,327 (2d Cir. 1953); *Brotherhood of Ry. & Steamship Clerks v. Atlantic Coast Line R.R.*, 201 F.2d 36 (4th Cir. 1953); *Isgett v. Atlantic Coast Line R.R.*, 74 S.E.2d 220, 22 CCH Lab. Cas. ¶ 67,390 (S.C. 1953); *Naylor v. Harkins*, 94 A.2d 825, 23 CCH Lab. Cas. ¶ 67,425 (N.J. 1953); *Spires v. Southern Ry.*, 204 F.2d 453, 23 CCH Lab. Cas. ¶ 67,618 (4th Cir. 1953); *Hippensteel v. System Federation 9*, 59 N.W. 2d 278, 23 CCH Lab. Cas. ¶ 67,679 (Mich. 1953); *Farris v. Alaska Airlines, Inc.*, 113 F. Supp. 907, 24 CCH Lab. Cas. ¶ 67,752 (W.D. Wash. 1953); *Hester v. Brotherhood of R.R. Trainmen*, 206 F.2d 279, 24 CCH Lab. Cas. ¶ 67,786 (8th Cir. 1953).

²⁰² See note 82 *supra*.

²⁰³ See note 83 *supra*.

condition" within the meaning of the RLA, and therefore that the NRAB has exclusive primary jurisdiction over a dispute concerning the application of a union-security agreement.²⁰⁴

V

THE COLLECTIVE AGREEMENT IN THE COURTS

The past year has produced a number of interesting decisions, especially those involving Section 301 of the Labor Management Relations Act.

The decisions have adhered to the view that Section 301 creates a federal substantive right independent of state law in actions for breach of a collective agreement. But, as one court aptly has stated, "all courts are not in agreement on the extent or nature of the rights created by the legislation, nor do they agree upon the extent of the remedies available."²⁰⁵ Thus, there is divergence of opinion as to whether, and as to what extent, the courts have equity jurisdiction under Section 301. Probably the problem of greatest importance in this connection is whether Section 301 confers upon the federal courts the power specifically to enforce by mandatory injunction an arbitration provision in a collective agreement. Three decisions of the past year, involving suits by labor unions, have answered this question in the affirmative.²⁰⁶ As previously indicated, however, other federal courts have taken the position that Section 301 confers jurisdiction solely for the purpose of actions for damages and that they have no authority to entertain suits for equitable relief against breach of contract.²⁰⁷ The importance of the rulings that Section 301 empowers the federal courts to direct enforcement of arbitration provisions is emphasized by the fact that most federal courts which have considered the problem have held that the United States Arbitration Act²⁰⁸ is

²⁰⁴ *United R.R. Operating Crafts v. Wyer*, 109 F. Supp. 916, 23 CCH Lab. Cas. ¶ 67,545 (S.D.N.Y.), *aff'd*, 205 F.2d 153, 23 CCH Lab. Cas. ¶ 67,685 (2d Cir. 1953).

²⁰⁵ *ILWU, Local 142 v. Libby, McNeill & Libby*, 114 F. Supp. 249, 250, 24 CCH Lab. Cas. ¶ 67,821 (D. Hawaii 1953).

²⁰⁶ *Milk & Ice Cream Drivers & Dairy Employees Union, Local No. 98 v. Gillespie Milk Products Corp.*, 203 F.2d 650, 23 CCH Lab. Cas. ¶ 67,518 (6th Cir. 1953); *Textile Workers Union v. American Thread Co.*, 113 F. Supp. 137, 23 CCH Lab. Cas. ¶ 67,660 (D. Mass. 1953); *International Union, Local 379, UAW v. Jacobs Mfg. Co.*, 24 CCH Lab. Cas. ¶ 67,751 (D. Conn. 1953). The first two decisions expressly reject the notion that the anti-injunctive limitations of the Norris-LaGuardia Act preclude such relief.

²⁰⁷ *Castle & Cooke Terminals v. Local 137, ILWU*, 110 F. Supp. 247, 23 CCH Lab. Cas. ¶ 67,419 (D. Hawaii 1953); *Associated Telephone Co. v. Communications Workers*, 114 F. Supp. 334, 24 CCH Lab. Cas. ¶ 67,774 (S.D. Cal. 1953); *ILWU, Local 142 v. Libby, McNeill & Libby*, 114 F. Supp. 249, 24 CCH Lab. Cas. ¶ 67,821, and 115 F. Supp. 123 (D. Hawaii 1953).

²⁰⁸ 61 Stat. 669 (1947), 9 U.S.C. §§ 1-14 (Supp. 1952).

inapplicable to collective labor agreements.²⁰⁹ But a recent decision of the third circuit,²¹⁰ sitting *en banc*, seems to compound confusion in an area already beset by conflict of judicial opinion. Plaintiff, a corporation engaged in the manufacture of goods for sale in interstate commerce, brought an action for damages under Section 301 against a labor union for calling a strike in violation of a collective agreement containing an arbitration clause. Defendant moved for a stay pursuant to Section 3 of the Arbitration Act. A majority of the court, while conceding that collective agreements are "contracts of employment" within the meaning of the exclusion in Section 1, held that the qualifying phrase "of . . . any other class of workers engaged in foreign or interstate commerce" referred only to workers who, like seamen or railroad employees, were engaged directly in the channels of commerce and not to those whose activities merely affected commerce. Hence, Section 3 was applicable and the union entitled to a stay if an arbitrable issue was presented and the union was not in default in invoking arbitration. This holding, a concurring opinion based upon the theory that a collective agreement is not a "contract of employment" excluded from the coverage of the Arbitration Act, and a dissent urging that the exclusionary phrase subsumes collective agreements involving all activities affecting interstate commerce, reflect the need of further clarification of an important problem.²¹¹

Several cases have dealt with the substantive question of what constitutes a violation of contract within the meaning of Section 301. The most interesting is that which holds that a collective agreement, comprehensively governing terms and conditions of employment and containing a typical management-rights clause, will not be construed to contain an implied condition that the employer will not decentralize its operations.²¹²

The question of the extent to which individual employees are the beneficiaries of rights under the collective agreement was involved in several decisions. Whether parties not signatory to an agreement

²⁰⁹ See 65 Harv. L. Rev. 1239 (1952).

²¹⁰ *Tenney Engineering, Inc. v. UE Local 437*, 207 F.2d 450, 24 CCH Lab. Cas. ¶ 67,878 (3d Cir. 1953).

²¹¹ Other jurisdictional problems under Section 301 are involved in *Claycraft Co. v. UMW*, 204 F.2d 600, 23 CCH Lab. Cas. ¶ 67,621 (6th Cir. 1953) (service of process); *Waialua Agricultural Co. v. United Sugar Workers, ILWU Local 142*, 114 F. Supp. 243, 24 CCH Lab. Cas. ¶ 67,756 (D. Hawaii 1953) (agricultural laborers).

²¹² *Local 600, UAW v. Ford Motor Co.*, 113 F. Supp. 834, 24 CCH Lab. Cas. ¶ 67,750 (E.D. Mich. 1953). Other interesting cases involving alleged contract violations are: *Reinauer Transportation Cos. v. United Marine Division, ILA, Local 333*, 112 F. Supp. 940, 23 CCH Lab. Cas. ¶ 67,530 (S.D.N.Y. 1953); *UE v. Oliver Corp.*, 205 F.2d 376, 23 CCH Lab. Cas. ¶ 67,662 (8th Cir. 1953); *Morrison v. Shopmen's Local 682*, 114 F. Supp. 54, 24 CCH Lab. Cas. ¶ 67,811 (W.D. Ky. 1953).

may sue directly under Section 301 remains unsettled. The third circuit found it unnecessary to pass upon the question in a case in which it was decided that the third party in any event was not intended as a beneficiary of the agreement.²¹³ A federal district court has indicated, however, that a union may sue under Section 301 on behalf of its members for damages accruing to them as individuals, as distinguished from any damages resulting to the union as an entity.²¹⁴ Although many jurisdictions recognize the right of individual employees to sue to enforce collective agreements as third party beneficiaries, troublesome questions often are raised concerning the impact of grievance and arbitration provisions on this right. A West Virginia case holds that whether or not the arbitration clause precludes prior court action by individuals turns upon not merely the existence of the clause, but whether it expressly or by necessary implication creates a condition precedent to the right to sue.²¹⁵ A New York court has held that an action by employees as individuals is barred by a judgment confirming an arbitrator's award denying the claim when previously made by the union.²¹⁶ But the court's emphasis on plaintiffs' delay in commencing their action and on their failure to move to intervene in the action to confirm the award, suggests that individual employees may have the right to challenge an adverse award if the issue is properly raised.²¹⁷

VI

INTERNAL UNION AFFAIRS

The cases in this area have neither been numerous nor, with a few exceptions, of great significance. One of the exceptions is *Ford Motor Co. v. Huffman*,²¹⁸ involving the duty of a statutory representative to deal fairly on behalf of all employees within the bargaining

²¹³ *Isbrandtsen Co. v. Local 1291*, 114 F.2d 495, 23 CCH Lab. Cas. ¶ 67,585 (3d Cir. 1953).

²¹⁴ *Food & Service Trades Council v. Retail Associates, Inc.*, 115 F. Supp. 221, 24 CCH Lab. Cas. ¶ 67,927 (N.D. Ohio 1953).

²¹⁵ *Pettus v. Olga Coal Co.*, 72 S.E.2d 881, 22 CCH Lab. Cas. ¶ 67,336 (W. Va. 1952).

²¹⁶ *Curtis v. N.Y. World Telegram Corp.*, 282 App. Div. 183, 121 N.Y.S.2d 825, 23 CCH Lab. Cas. ¶ 67,632 (1st Dep't 1953).

²¹⁷ The remaining decisions dealing with the collective agreement in the main involve questions of interpretation. Among the more interesting are: *Hudson Co. Newspaper Guild v. Jersey Publishing Co.*, 93 A.2d 183, 22 CCH Lab. Cas. ¶ 67,305 (N.J. App. Div. 1952); *Agnell v. Illinois Bell Telephone Co.*, 109 N.E. 2d 398, 22 CCH Lab. Cas. ¶ 67,308 (Ill. App. 1952); *Haefele v. Davis*, 95 A.2d 195, 23 CCH Lab. Cas. ¶ 67,398 (Pa. 1953); *McDowell v. Farwest Garments, Inc.*, 249 P.2d 372, 23 CCH Lab. Cas. ¶ 67,546 (Wash. 1952); *Mencher v. Weiss*, 114 N.E.2d 177, 24 CCH Lab. Cas. ¶ 67,797 (1953).

²¹⁸ 345 U.S. 330 (1953).

unit. The company and the employee's representative had executed a collective agreement containing provisions under which the company, in determining relative seniority among its employees, gave them credit for pre-employment military service as well as credit for post-employment service. In an action by employees having no pre-employment service, the Supreme Court rejected the contention that the union had exceeded its statutory authority in negotiating these provisions. While adhering to the principle that the bargaining representative must represent all employees fairly and without hostility to any, the Court further stated that "a wide range of reasonableness must be allowed." And after what is probably the most complete description of allowable variables that it has thus far essayed, the Court concluded that credit for pre-employment military service, while not compelled by statute, clearly was not inconsistent with the policy declared in relevant statutes and was "within reasonable bounds of relevancy."

The courts continue to look to the union constitution as the controlling feature in disposing of most internal union controversies. Thus, an interesting California case involving union membership turned upon a section of the constitution of an international union which provided that local unions are required to admit to membership traveling members of other locals who present certain credentials. In awarding damages resulting from denial of admission to a traveling member, the court held that the international constitution was part of the contract between the union and its members and governed the defendant local, and that the plaintiff's contractual right to membership under the plain terms of the constitution could not be denied under the guise of a contrary "interpretation" by the international president.²¹⁹ Similarly, the custom of selecting a trial committee by lot in expulsion proceedings could not prevail against a clear constitutional requirement that such a committee be elected by the membership.²²⁰ Again, the Mississippi Supreme Court has held that failure to comply with a constitutional provision for giving notice of dues delinquency precluded the denial of certain benefits which might otherwise have followed from such delinquency.²²¹

Even though union constitutional procedures have been observed, disciplinary action may be declared illegal for lack of procedural fairness. So it was held in a case in which plaintiff's membership

²¹⁹ *Mandrach v. Bartenders Union, Local 41*, 256 P.2d 927, 23 CCH Lab. Cas. ¶ 67,637 (Cal. 1953).

²²⁰ *Hopson v. National Union of Marine Cooks & Stewards*, 253 P.2d 733, 23 CCH Lab. Cas. ¶ 67,499 (Cal. App. 1953).

²²¹ *United Brotherhood of Carpenters & Joiners v. Barr*, 64 So.2d 150, 23 CCH Lab. Cas. ¶ 67,549 (Miss. 1953).

was annulled without notice or opportunity to be heard.²²² But several cases make plain that union disciplinary procedure need not be conducted with the formality that obtains in judicial proceedings; an impression of "substantial fairness" will suffice to insulate against judicial intervention.²²³ And the same decisions further indicate that in reviewing the evidence upon which the union's action is based, the courts will not substitute their judgment for that of the union tribunal.

Although the "rule" requiring exhaustion of internal remedies occasionally is made the basis for denial of judicial intervention,²²⁴ it appears that the exceptions are applied more often than the rule. Thus, no exhaustion was required in cases in which aggrieved members would have had to wait about two years before taking the next step, an appeal to the union convention.²²⁵ Neither did the rule preclude a union's international representative from maintaining an action for salary allegedly due him, in the absence of a provision in the union's constitution for the internal prosecution of money claims.²²⁶

The important disaffiliation case of *Harker v. McKissock*, discussed in the 1951 *Survey*,²²⁷ again came before the New Jersey Supreme Court during the past year.²²⁸ The present decision dealt in the main with particular applications of the "contract" theory adopted by the court in its original decision, in which it held that there had been a valid secession of the local union from the national, but that a provision of the national's constitution for the transfer, upon disaffiliation, of the local's property to the national was valid and enforceable.²²⁹ Of perhaps greatest significance in the latest decision is the holding that disaffiliation ended the national's interest in the current collective agreement between the local and the employer of its members, and in the dues and initiation fees checked off subsequent to disaffiliation. However, in another case, where a collective agreement had been executed by an international union previously certified as statutory representative, a federal district court refused to restrain

²²² *Musicians Protective Ass'n, Local 466 v. Semon*, 254 S.W.2d 211, 22 CCH Lab. Cas. ¶ 67,383 (Tex. Civ. App. 1952).

²²³ *Dakchoylous v. Ernst*, 118 N.Y.S.2d 455, 23 CCH Lab. Cas. ¶ 67,640 (Sup. Ct. 1952); *Miller v. International Union of Operating Engineers*, 257 P.2d 85, 23 CCH Lab. Cas. ¶ 67,643 (Cal. App. 1953); *Naylor v. Harkins*, 99 A.2d 849, 24 CCH Lab. Cas. ¶ 67,924 (N.J. Ch. Div. 1953).

²²⁴ *Gray v. Atkins*, 122 N.Y.S.2d 36, 22 CCH Lab. Cas. ¶ 67,364 (Sup. Ct. 1953).

²²⁵ *Underwood v. Maloney*, 14 F.R.D. 222, 23 CCH Lab. Cas. ¶ 67,588 (E.D. Pa. 1953); *Naylor v. Harkins*, 94 A.2d 825, 23 CCH Lab. Cas. ¶ 67,425 (N.J. 1953).

²²⁶ *Beedie v. IBEW*, 96 A.2d 89, 23 CCH Lab. Cas. ¶ 67,560 (N.J. App. Div. 1953).

²²⁷ 1951 Annual Surv. Am. L. 350.

²²⁸ 96 A.2d 660, 23 CCH Lab. Cas. ¶ 67,620 (N.J. 1953).

²²⁹ A decision of the past year applying the "contract" concept is *Feller v. Egelhofer*, 24 CCH Lab. Cas. ¶ 67,877 (N.Y. Sup. Ct. 1953).

the employer from continuing to recognize the international union under the agreement because the local unions involved had disaffiliated.²³⁰

Two additional cases, both decided by the Wisconsin Supreme Court, merit attention. In the first, the court held that "affiliation" by a local union with a national organization was not precluded by the absence of any provision for such action in the local's constitution. The court emphasized that the local remains an autonomous body, retains control over its treasury and other property, and is free to disaffiliate and keep its property.²³¹ The second decision serves as a warning to employers that propaganda to employees in which it is stated falsely that "the small group of officers" of the union have engaged in "misconduct," "misrepresented" the purpose of a union meeting, left in doubt the validity of an affiliation election, and "executed an underhanded maneuver" respecting union funds, will sustain a libel action brought by the union officers.²³²

VII

MISCELLANEOUS

Non-Communist Affidavits.—Last year's *Survey* noted that some courts of appeals had held that a union, in order to avail itself of the machinery of the NLRB, must be in compliance with the Taft-Hartley affidavit provisions at the time a charge is filed, and that subsequent compliance before the issuance of a complaint does not suffice to confer jurisdiction on the Board.²³³ The Supreme Court in *NLRB v. Dant*²³⁴ has reversed these rulings, holding in substance that the language of Section 9(h) is plain that compliance is required only as of the time of issuance of the complaint. In reliance upon this decision, the first and sixth circuits have ruled that compliance is not a condition precedent to an employer's duty to bargain under Section 8(a)(5).²³⁵ But the fifth circuit has held that the *Dant* decision does not sustain the NLRB's jurisdiction in a situation in which the charging union was not in compliance when the original complaint was issued but came into compliance before the issuance

²³⁰ Bi-County Joint Board v. Marshall Field & Co., 22 CCH Lab. Cas. ¶ 67,392 (M.D.N.C. 1952).

²³¹ Herman v. UAW, 59 N.W.2d 475, 23 CCH Lab. Cas. ¶ 67,718 (Wis. 1953).

²³² De Witte v. Kearney & Trecker Corp., 60 N.W.2d 748, 24 CCH Lab. Cas. ¶ 67,922 (Wis. 1953).

²³³ 1952 Annual Surv. Am. L. 269, 28 N.Y.U.L. Rev. 300 (1953).

²³⁴ 344 U.S. 375 (1953).

²³⁵ NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131, 23 CCH Lab. Cas. ¶ 67,663 (1st Cir. 1953); NLRB v. Tennessee Egg Co., 201 F.2d 370, 23 CCH Lab. Cas. ¶ 67,403 (6th Cir. 1953).

of an amended complaint.²³⁶ Other important decisions involving the affidavit requirements were occasioned by a "presentment" handed up by the October 1952 grand jury in the District Court for the Southern District of New York, in which the grand jury accused specified union officers of falsifying their affidavits and recommended certain action by the NLRB and the Congress of the United States, but did not call for prosecution of the accused officers. The district court has held that the grand jury lacked power to issue such a "presentment,"²³⁷ and the District Court for the District of Columbia has held that the NLRB is without power to investigate the authenticity of affidavits filed with it.²³⁸

Representation Proceedings.—Space limitations preclude detailed reference to the many important rulings of the NLRB and the courts involving representation proceedings. Among the more significant of these, however, are decisions of the courts of appeals upholding the NLRB's position that the showing of substantial union interest ordinarily required by the Board is an administrative matter and does not present a litigable issue;²³⁹ a decision of the third circuit,²⁴⁰ in which the NLRB subsequently acquiesced,²⁴¹ holding that the limitations of Section 9(c)(3) on the organizational rights of "guards" are applicable to plant-protection employees whose employer is in the business of furnishing their services to other companies; a holding of the sixth circuit that the NLRB erred in excluding the employer's nephew from a bargaining unit because of family relationship;²⁴² a decision of the NLRB in which it adopted a new test in determining whether a long-term contract barred an election, the Board stating that it would so operate if "a substantial part of the industry is covered by contracts with a similar term";²⁴³ and an NLRB ruling

²³⁶ NLRB v. Atlanta Metallic Casket Co., 205 F.2d 931, 23 CCH Lab. Cas. ¶ 67,727 (5th Cir. 1953).

²³⁷ In re United Electrical, Radio & Machine Workers, 111 F. Supp. 858, 23 CCH Lab. Cas. ¶ 67,529 (S.D.N.Y. 1953).

²³⁸ UE v. Herzog, 110 F. Supp. 220, 22 CCH Lab. Cas. ¶ 67,358 (D.D.C. 1953).

²³⁹ NLRB v. J. I. Case Co., 201 F.2d 597, 22 CCH Lab. Cas. ¶ 67,370 (9th Cir. 1953); NLRB v. White Construction & Engineering Co., 204 F.2d 950, 23 CCH Lab. Cas. ¶ 67,649 (5th Cir. 1953).

²⁴⁰ NLRB v. American District Telegraph Co., 205 F.2d 86, 23 CCH Lab. Cas. ¶ 67,657 (3d Cir. 1953).

²⁴¹ Armored Motor Service Co., 106 N.L.R.B. No. 181 (Sept. 18, 1953).

²⁴² NLRB v. Sexton, 203 F.2d 940, 23 CCH Lab. Cas. ¶ 67,570 (6th Cir. 1953). The NLRB has since announced that it would no longer exclude such relatives unless it is shown that because of the relationship the employee "enjoys a special status which allies his interests with those of management." International Metal Products Co., 107 N.L.R.B. No. 23 (Nov. 19, 1953).

²⁴³ General Motors Corp., 102 N.L.R.B. No. 115 (Feb. 6, 1953).

that when a union withdraws its petition before a run-off election, it may not file another within a year.²⁴⁴

Again this year there have been unsuccessful efforts to obtain direct review of representation cases,²⁴⁵ or otherwise to secure judicial intervention in such proceedings.²⁴⁶ The courts have reiterated the principles that representation cases are reviewable only in connection with unfair labor practice proceedings under Section 10, and that the general equity powers of the courts cannot be invoked, at least when no substantial constitutional question is raised.

Settlement Agreements.—In a decision which appears to be of considerable practical importance in the administration of the NLRA, the third circuit has held that once the NLRB issues a complaint alleging the commission of unfair labor practices, the Board and the party respondent cannot arrange a binding settlement without affording the party which had filed the unfair labor practice charges a hearing on any objections the charging party might have to the terms of the settlement.²⁴⁷

In conclusion, one further matter merits attention. This is the passage in New York and New Jersey of substantially identical legislation,²⁴⁸ later ratified by the Congress of the United States,²⁴⁹ which resulted in the Waterfront Commission Compact containing a comprehensive scheme of regulation of water-front labor conditions at the Port of New York. A federal three-judge statutory court has rejected an attack upon the constitutionality of the compact.²⁵⁰

²⁴⁴ United States Steel Corp. (Pittsburgh Steamship Division), 106 N.L.R.B. No. 213 (Oct. 9, 1953).

²⁴⁵ Cameron v. NLRB, 24 CCH Lab. Cas. ¶ 67,913 (6th Cir. 1953).

²⁴⁶ E.g., New Bedford Loomfixers' Union v. Alpert, 110 F. Supp. 723, 23 CCH Lab. Cas. ¶ 459 (D. Mass. 1953); American Cable & Radio Corp. v. Douds, 111 F. Supp. 482, 23 CCH Lab. Cas. ¶ 67,508 (S.D.N.Y. 1953); Ideal Roller & Mfg. Co. v. Douds, 111 F. Supp. 156, 23 CCH Lab. Cas. ¶ 67,514 (S.D.N.Y. 1953).

²⁴⁷ Marine Engineers' Beneficial Ass'n, No. 13 v. NLRB, 202 F.2d 546, 23 CCH Lab. Cas. ¶ 67,447 (3d Cir.), cert. denied, 74 Sup. Ct. 32 (1953). The court indicated that the result would have been otherwise had no complaint issued. See Anthony v. NLRB, 204 F.2d 832, 23 CCH Lab. Cas. ¶ 67,667 (6th Cir. 1953).

²⁴⁸ N.Y. Laws 1953, cc. 882, 883; N.J. Laws 1953, cc. 202, 203.

²⁴⁹ Pub. L. No. 252, 83d Cong., 1st Sess. (Aug. 12, 1953).

²⁵⁰ Linehan v. Waterfront Commission of New York Harbor, 24 CCH Lab. Cas. ¶ 67,937 (S.D.N.Y. 1953).

FOOD, DRUG AND COSMETIC LAW

DAVID H. VERNON

THE MOST important development in the field of food, drug and cosmetic law during 1953 was the legislative "restoration" of the compulsory inspection provisions of the Federal Food, Drug, and Cosmetic Act.¹

I

LEGISLATIVE DEVELOPMENTS

Compulsory Inspection.—Prior to the decision in *United States v. Cardiff*² compulsory factory inspection was a generally accepted facet of the federal enforcement structure,³ thought to be authorized by Sections 704⁴ and 301(f).⁵ The *Cardiff* case held that these provisions were too vague to be enforceable. The former authorized duly designated agents of the Food and Drug Administration to enter and inspect the premises "after first making request and obtaining permission of the owner. . . ." Under Section 301(f), the refusal "to permit entry as authorized by section 704" was a prohibited act and thus a misdemeanor under Section 303(a).⁶ The inspector could enter the premises only "after making request and obtaining permission," but the refusal to allow an inspection "as authorized by section 704" was a crime. Mr. Justice Douglas, speaking for the Court, said of this statutory conflict:

. . . we think it is not fair warning . . . to the factory manager that if he fails to give consent, he is a criminal. . . . We cannot sanction taking a man by the heels for refusing to grant the permission which this Act on its face apparently gave him the right to withhold.⁷

Since the whole enforcement structure was theoretically jeopard-

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¹ Pub. L. No. 217, 83d Cong., 1st Sess. (Aug. 7, 1953), 67 Stat. 477 (1953).

² 344 U.S. 174 (1952).

³ An example of the general acceptance of the compulsory features of factory inspection may be found in Commissioner Crawford's testimony that prior to the 1938 Act approximately 5 per cent of the producers refused to admit inspectors on a voluntary basis, but that under the 1938 Act, "the refusals dropped practically to zero. Maybe we had 1 or 2 in 2 or 3 years, or something like that; less than 1 a year, I should say." During the six months immediately following the *Cardiff* case, Commissioner Crawford reported eighteen refusals of entry. Hearings before House Committee on Interstate and Foreign Commerce on Factory Inspection on H.R. 2769, 3551, 3604, 83d Cong., 1st Sess. 80 (1953).

⁴ 52 Stat. 1057 (1938), 21 U.S.C. § 374 (1946).

⁵ 52 Stat. 1042 (1938), 21 U.S.C. § 331(f) (1946).

⁶ 52 Stat. 1043 (1938), 21 U.S.C. § 333(a) (1946).

⁷ *United States v. Cardiff*, 344 U.S. 174, 176, 177 (1952).

ized by the decision, necessary corrective legislation was immediately introduced. Two identical bills would have effectuated the clarification by substituting "after first giving written notice to" for the permissive language of Section 704.⁸ A third bill would have accomplished the same result by striking the permissive language and inserting "after first exhibiting proper credentials to."⁹ Either would have removed the damning vagueness. As finally enacted, the two methods were combined, and the section now authorizes entry and inspection "upon presenting appropriate credentials and a written notice."¹⁰

Presentation of Credentials and Notice.—During the hearings, some Committee members expressed the opinion that under the existing language, the requisite notice and credentials might be presented to the janitor of the plant to be inspected rather than to someone of authority.¹¹ The pertinent language was that the presentation could validly be made to "the owner, operator, or *custodian*."¹² (Emphasis supplied.) Although, on the basis of practice¹³ and of decision,¹⁴ it seems inconceivable that the word "custodian" could be interpreted to mean a person in the position of a janitor, a change was made. The word "custodian" was struck from Section 704 and the phrase "agent in charge" substituted.¹⁵ This portion of the amendment, while harmless, seems to have been superfluous.

Scope of Inspection.—A more substantial conflict of interpretation arose as to the actual scope of the inspection itself. The questioned grant of power conferred authority "to inspect, at reasonable times such factory, warehouse, establishment, or vehicle and all pertinent equipment, finished and unfinished materials, containers, and labeling therein."¹⁶ The conflict concerned the question whether this language contemplated what might be called a "physical" inspection,¹⁷ or whether, as the Food and Drug Administration asserted, the language encompassed a search of "complaint files," personnel records dealing with the technical qualifications of employees, secret formulas, manufacturing work sheets, coding systems, confidential prescription files, and other such data having at most an indirect effect on the physical

⁸ H. R. 2769, 83d Cong., 1st Sess. (1953) and H. R. 3604, 83d Cong., 1st Sess. (1953).

⁹ H. R. 3551, 83d Cong., 1st Sess. (1953).

¹⁰ Pub. L. No. 217, 83d Cong., 1st Sess. (Aug. 7, 1953), 67 Stat. 477 (1953).

¹¹ See Hearings, *supra* note 3, at 28, 48-52.

¹² 52 Stat. 1057 (1938), 21 U.S.C. § 374 (1946).

¹³ See Hearings, *supra* note 3, at 48.

¹⁴ *United States v. Maryland Baking Co.*, 81 F. Supp. 560 (N.D. Ga. 1948).

¹⁵ Pub. L. No. 217, 83d Cong., 1st Sess. (Aug. 7, 1953), 67 Stat. 477 (1953).

¹⁶ 52 Stat. 1057 (1938), 21 U.S.C. § 374(2) (1946).

¹⁷ See Hearings, *supra* note 3, particularly testimony of Charles W. Dunn at 29 et seq., testimony of Thomas Austern at 135 et seq. and testimony of Frederick J. Cullen, M.D., at 171 et seq.

conditions within the plant.¹⁸ The clash of opinion on this question was succinctly summarized during the hearings by Congressman Bennett, when he said to one of the witnesses:

The thing that concerns me is that this language is crystal-clear to you; it is crystal-clear to Mr. Dunn; it is crystal-clear to Mr. Crawford, but you are all looking through different crystals.¹⁹

In an attempt to resolve these hostile interpretations, the authorization was restricted to an inspection conducted *in a reasonable manner* and *within reasonable limits* as well as *at reasonable times*.²⁰ What is an inspection "at reasonable times and within reasonable limits and in a reasonable manner"? It is patent that reasonable men may differ as to the scope of a reasonable inspection. The Food and Drug Administration would certainly assert that it never claimed to have anything but reasonable powers. On its face, the new section seems to be as uncertain regarding the scope of the inspection power as was the original section. An examination of the report of the House Committee is of little or no assistance in discovering what Congress intended by the changes. The Committee did report that the amended section was "intended to provide compulsory, *but limited*, inspection power."²¹ (Emphasis supplied.) However, in explaining what this limited inspection would encompass, the report adverts to the language of the original section, saying:

The requirement for the inspection "within reasonable limits and in a reasonable manner" has been inserted in the bill for the purpose of confining the scope of inspection to . . . factory, warehouse, establishment, or vehicle, and all pertinent equipment, finished and unfinished materials, containers, and labeling therein.²²

Since the House Committee report is innocuous at best, it is necessary to turn to the debates on the floor of the House for clarification. In answer to questions from the floor, various members of the Committee explained what an inspection in a reasonable manner and within reasonable limits would *not* include. Such an inspection was held *not* to include an examination of "the owners' profit-and-loss statement, his complaint files, or . . . files relating to the qualifications of the people working for him."²³ It was also asserted on the floor that the amended section did *not* authorize an inquiry as to secret

¹⁸ See petition for writ of certiorari in *United States v. Cardiff*, 344 U.S. 174 (1952).

¹⁹ Hearings, *supra* note 3, at 141.

²⁰ Pub. L. No. 217, 83d Cong., 1st Sess. (Aug. 7, 1953), 67 Stat. 477 (1953).

²¹ H.R. Rep. No. 708 on H.R. 5740, 83d Cong., 1st Sess. 7 (1953).

²² *Ibid.*

²³ 99 Cong. Rec. 9241 (July 16, 1953). This statement on the scope of the inspection was commended by several members of the Committee, including the chairman, as accurately setting forth the views of the Committee.

formulas,²⁴ nor did it expand the powers granted by the Durham-Humphrey Amendment as to the inspection of confidential prescription files of retail druggists.²⁵ The debates in the House, while not affirmatively defining the scope of the authority granted, did, by limitation, give a clear picture of the type of action contemplated. It would appear that the House intended to limit the grant of authority to a "physical" inspection, *i.e.*, an examination of the physical facilities of the plant and the physical condition of the materials used.

If this were the extent of the legislative history, the scope of the inspection power could be said to have been rather clearly delineated by the amendment. However, the report of the Senate Committee set forth that an authorized inspection *would* encompass complaint files, secret formulas, personnel records and the like.²⁶ In effect, the Senate report restated the position taken by the Food and Drug Administration prior to the amendment. How much weight should be given the Senate report? The Senate held no hearings on the bill, and accepted the House proposals in toto. Debate in the Senate brought out the fact that the full Committee had never seen the report prior to its publication.²⁷ It was further pointed out that it was possible that no one on the subcommittee, with the exception of the chairman, Senator Purtell, had seen the report prior to publication.²⁸ The bill was House devised, House investigated and House inspired. In the light of the cursory attention the amendment received in the Senate, and in the light of the bill's House origin, it would seem that the intention of the House, as expressed during the extensive floor debates on the bill, should prevail as being the "intent" of Congress. Thus, the amended section leaves to the courts the task of determining what a reasonable "physical" inspection would be under the circumstances in each case.

Reports and Receipts.—The inspection provision of the Act was further amended by the addition of three new subdivisions. Subdivision (b) of Section 704 provides that upon the completion of an inspection

²⁴ 99 Cong. Rec. 9165 (July 15, 1953).

²⁵ 99 Cong. Rec. 9241, 9242 (July 16, 1953). This is particularly patent in the light of the rejection by the House of a proposed Senate amendment to Section 503(b). The proposed amendment reads as follows: "(6) Prescription files in retail drugstores may be inspected only in accordance with the procedure prescribed in Section 704, as amended, and only when the officer or employee giving notice of inspection (A) has reason to believe that the retail drugstore has dispensed drugs in violation of this section; or (B) is engaged in tracing the distribution of dangerously adulterated or misbranded drug or new drug for which there is no effective application under Section 505." The Durham-Humphrey amendment was enacted in 1951. 65 Stat. 648, 21 U.S.C. § 353(b) (Supp. 1952).

²⁶ Sen. Rep. No. 712 on H.R. 5740, 83d Cong., 1st Sess. 4 (1953).

²⁷ 99 Cong. Rec. 11302 (Aug. 3, 1953).

²⁸ *Ibid.*

and prior to leaving the premises, the officer or employee making the inspection shall give to the owner . . . a report in writing setting forth any conditions or practices observed by him which, in his judgment, indicate that any food, drug, device or cosmetic in such establishment (1) consists in whole or in part of any filthy, putrid, or decomposed substance, or (2) has been prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health. A copy of such report shall be sent promptly to the Secretary.²⁹

The Committee reported that "[t]he principal purpose of this provision [was] to aid factory owners who desire to avoid introducing an adulterated or misbranded article into interstate commerce."³⁰ The manufacture of an article under insanitary conditions is not in itself a violation of the Act, the prohibited act being the introduction into interstate commerce of an article prepared under such conditions.³¹ The provision should be effective in preventing violations and in aiding the correction of dangerous conditions. Subdivision (b), limited as it is to reports of the physical conditions observed, would seem to bolster the idea that the scope of the inspection was meant to be limited to a physical examination of the plant and materials.

Subdivisions (c)³² and (d)³³ deal with the procedure to be followed when a sample is obtained during an inspection. The former provides that a receipt be given when a sample is obtained during an inspection, while the latter provides that a report of an analysis made of such sample be furnished the *food* manufacturer from whose plant the sample was taken. Here again, the section provides for advance notice that certain shipments will be in violation of the Act, and thus deters such shipments.

In conjunction with the reports contemplated by subdivisions (b) and (d), Section 301(n) was enacted, prohibiting the use of

²⁹ Pub. L. No. 217, 83d Cong., 1st Sess. (Aug. 7, 1953), 67 Stat. 477 (1953).

³⁰ H.R. Rep. No. 708 on H.R. 5740, 83d Cong., 1st Sess. 11 (1953).

³¹ 52 Stat. 1046 (1938), 21 U.S.C. § 342(a) (4) (1946).

³² Pub. L. No. 217, 83d Cong., 1st Sess. (Aug. 7, 1953), 67 Stat. 477 (1953). Section 704(c) reads as follows: "(c) If the officer or employee making any such inspection of a factory, warehouse, or other establishment has obtained any sample in the course of the inspection, upon completion of the inspection and prior to leaving the premises he shall give to the owner, operator, or agent in charge a receipt describing the samples obtained."

³³ Pub. L. No. 217, 83d Cong., 1st Sess. (Aug. 7, 1953), 67 Stat. 477 (1953). Section 704(d) reads as follows: "(d) Whenever in the course of any such inspection of a factory or other establishment where food is manufactured, processed, or packed, the officer or employee making the inspection obtains a sample of any such food, and an analysis is made of such sample for the purpose of ascertaining whether such food consists in whole or part of any filthy, putrid, or decomposed substance, or is otherwise unfit for food, a copy of the results of such analysis shall be furnished promptly to the owner, operator, or agent in charge."

such reports in any form of sales promotion.³⁴ This wisely prevents the utilization of the Food and Drug Administration report to gain unfair competitive advantages.

Finally, the hearing on the proposed amendments to "restore" compulsory inspection produced a minor change in Section 304(c).³⁵ Prior to the change, a court could order that a copy of an analysis on which a seizure was based be supplied to any party to the proceeding only when fresh fruits and fresh vegetables were involved. This privilege was extended to include all seizure proceedings.

One separate amendment to the Act was passed during 1953, striking the term "aureomycin" from Sections 502(1) and 507 and inserting "chlortetracycline" in lieu thereof.³⁶ "Aureomycin" is the trade-mark of a product manufactured by the Lederle Company, and the amendment was an attempt to prevent it from becoming generic.

II

CASE LAW DEVELOPMENT

Factory Inspection.—The practical effectiveness of the "physical" limitation placed on the inspection power by the amended Section 704 might be questioned on the basis of the opinion in *United States v. Arnold's Pharmacy, Inc.*,³⁷ a criminal prosecution involving "habit forming" drugs. The defendants objected, in part, that the prosecution was in violation of the immunity clause of Section 703.³⁸ However, the defendants did not object, at the time of the examination, to a search of their prescription records, nor did they insist, at that time, on a statement in writing as provided in Section 703, and the court said that it was clear that those who voluntarily turn over their records to the Government cannot object, under Section 703, to their use in a criminal proceeding.

As dicta, the court added that it was equally clear that

the section was intended to apply where access to the records was refused the Government. In that event, by proceeding under the statutory provision in question, the Government could obtain access to such records despite such refusal. But, if the Government did so proceed, the "evidence obtained under this section shall not be used in a criminal prosecution of the person from whom obtained."³⁹

On the basis of this dicta, it might be asserted that where a producer, in the course of an inspection, refuses access to his records on the

³⁴ Pub. L. No. 217, 83d Cong., 1st Sess. (Aug. 7, 1953), 67 Stat. 477 (1953).

³⁵ *Ibid.*

³⁶ Pub. L. No. 201, 83d Cong., 1st Sess. (Aug. 7, 1953), 67 Stat. 389 (1953).

³⁷ 2 CCH F.D.C. Rep. ¶ 7269 (D.N.J. 1953).

³⁸ 52 Stat. 1057 (1938), 21 U.S.C. § 373 (1946).

³⁹ 2 CCH F.D.C. Rep. ¶ 7269 at pp. 8122, 8123 (D.N.J. 1953).

basis of Section 704, and the notice required by Section 703 is presented, the inspector could thus obtain information prohibited him by the former section. On the basis of such information, the Government, while barred from bringing a criminal action, might bring seizure or injunction proceedings. However, Section 703 was intended to apply to carriers and conduits,⁴⁰ and it is doubtful that it will be extended so as to pervert the congressional intention as regards the scope of authorized inspection.

Standing to Petition.—The most interesting decision under the Federal Act during 1953 was *Reade v. Ewing*,⁴¹ where a consumer, by reason of his mere existence as such, was held to have standing to petition for a court review of a food standard promulgated under the authority of Section 401.⁴² The two jurisdictional requirements to support such a petition are (1) that the allegations disclose a case of actual controversy; and (2) that the petitioner be adversely affected by the order.⁴³ In *Reade v. Ewing* the court held that the petitioner's asserted consumer interest constituted him a person "adversely affected," and further, that a case of actual controversy existed because Congress had authorized persons who were adversely affected to bring actions to restrain administrative officers from transcending their statutory authority. Thus, a finding that a petitioner is "adversely affected" was held necessarily to call for a finding that "a case of actual controversy" existed.

In the *Reade* case the court likened the consumer-petitioner to a "private Attorney General" and said that since there would be no constitutional objection to Congress authorizing "the Attorney General to bring suit to restrain a federal officer from exceeding his statutory authority,"⁴⁴ a suit by a congressionally appointed "private Attorney General" on the same grounds would be constitutionally unobjectionable. However, such an argument begs the constitutional question. Unless a "case" or "controversy" does exist, Congress may not grant standing, and, in requiring that "a case of actual controversy" exist, Congress intended to meet "the constitutional requirement for vesting in the Federal courts jurisdiction only of 'cases' or 'controversies.'"⁴⁵

In reaching its decision in *Reade v. Ewing* the court relied on two Supreme Court cases, *FCC v. Sanders Brothers Radio Station*⁴⁶

⁴⁰ See *United States v. 75 Cases of Peanut Butter*, 146 F.2d 124 (4th Cir. 1944), cert. denied, 325 U.S. 856 (1945).

⁴¹ 205 F.2d 630 (2d Cir. 1953).

⁴² 52 Stat. 1046 (1938), 21 U.S.C. § 341 (1946).

⁴³ 52 Stat. 1055 (1938); 21 U.S.C. § 371(f)(1) (1946).

⁴⁴ 205 F.2d 630, 632 (2d Cir. 1953).

⁴⁵ H.R. Rep. No. 2139, 79th Cong., 3d Sess. (1937), as reported in Dunn, Federal Food, Drug, and Cosmetic Act 825 (1938).

⁴⁶ 309 U.S. 470 (1940).

and *Scripps-Howard Radio v. FCC*.⁴⁷ The former held that, although the "resulting economic injury to a rival station is not, in and of itself, and apart from considerations of public convenience, interest, or necessity, an element the [Commissioner] must weigh, and as to which it must make findings, in passing on an application for a broadcasting license,"⁴⁸ a person suffering such an economic injury was a person "adversely affected" within the meaning of the Communications Act, Section 402(b)(2). The Court went on to say that Congress may conclude that a person adversely affected in a financial sense "would be the only person having a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission. . . ."⁴⁹ The decision in the *Scripps-Howard* case involved a stay of enforcement of a Commission order pending appeal by a person "adversely affected" as in the *Sanders* case, i.e., a person whose financial interest was threatened by the order. The court interpreted the *Sanders* case as holding that the Communications Act gave a right of appeal to persons "whose interests are adversely affected" by Commission action, and that "these private litigants have standing *only* as representatives of the public interest."⁵⁰ (Emphasis supplied.) The interest adversely affected was financial, and only because of the alleged effect on this traditional property interest were the petitioners in the two cases held to have "standing."

The *Reade* case does not present this type of situation. It is clear that had *Reade* petitioned solely to protect his financial interest, his petition would have been rejected. Had the two Supreme Court decisions held that every listener to radio and every viewer of television was a person "adversely affected" by every Federal Communication Commission ruling, the decision in the *Reade* case would be unimpeachable. However, lacking this holding, the *Reade* decision seems to go beyond the constitutional requirement that a "case" or "controversy" be present before the courts take jurisdiction.⁵¹ "Previous attempts of private litigants to obtain a special stake in public rights have been consistently denied."⁵² The consumer-petitioner in the *Reade* case is in the same position as the listener-petitioner under

⁴⁷ 316 U.S. 4 (1942).

⁴⁸ *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 473 (1940).

⁴⁹ *Ibid.*

⁵⁰ *Scripps-Howard Radio v. FCC*, 316 U.S. 4, 14 (1942).

⁵¹ U.S. Const. Art. III, § 2. See *Muskrat v. United States*, 219 U.S. 346 (1911).

⁵² Dissent in *Scripps-Howard Radio v. FCC*, 316 U.S. 4, 20 (1942). The dissenting opinion cited such classic examples as *Massachusetts v. Mellon*, 262 U.S. 447 (1923); *Sprunt & Son v. United States*, 281 U.S. 249 (1930); *Alabama Power Co. v. Ickes*, 302 U.S. 464 (1938); *Tennessee Elec. Power Co. v. Tennessee Valley Authority*, 306 U.S. 118 (1939); *Atlanta v. Ickes*, 308 U.S. 317 (1939); *Singer & Sons v. Union Pacific R.R.*, 311 U.S. 295 (1940).

the Communications Act, and it is to be seriously doubted that the Supreme Court intended, or that the Constitution allows, such listeners or consumers to have standing to sue.

Aside from the constitutional question, the *Reade* case raised several interesting statutory problems. The petitioner was a producer of a natural fortifier of oleomargarine, who asserted that he was, as a producer and as a consumer, "adversely affected" because the standard did not require that the labeling indicate that a synthetic, rather than a natural fortifier had been used. The court did not pass on the validity of Reade's petition as a producer, for they accepted his petition as a consumer. It is clear from the opinion, however, that as a producer of a component of a standardized food objecting to the inclusion of a competing component, Reade's petition would have been rejected for the lack of showing that he had been "adversely affected" as contemplated by the Act.⁵⁵ By recognizing a consumer petition, the case appears to negate, in a practical sense, all earlier restrictions on standing to object to a food standard.⁵⁴

Prior to the present decision, only three groups had been held to have been adversely affected by a standard promulgated under Section 401: (1) producers of the article being standardized;⁵⁵ (2) producers of articles which had been excluded by the standard;⁵⁶ and (3) producers of articles in direct competition with the article being standardized.⁵⁷ *Reade v. Ewing* establishes the fourth group to be affirmatively recognized as being adversely affected. This group, the

⁵⁵ The court said that it "need not consider whether, in the light of our previous decisions, the allegations of petitioner's interest as a producer suffice to meet the jurisdictional requirements" 205 F.2d 630, 631 (2d Cir. 1953), citing *United States Cane Sugar Refiners' Ass'n v. McNutt*, 138 F.2d 116 (2d Cir. 1943) and *American Lecithin Co. v. McNutt*, 155 F.2d 784 (2d Cir. 1946).

⁵⁴ See *United States Cane Sugar Refiners' Ass'n v. McNutt*, 138 F.2d 116 (2d Cir. 1943); *American Lecithin Co. v. McNutt*, 155 F.2d 784 (2d Cir. 1946). Cf. *Washington State Apple Advertising Comm'n v. Federal Security Administrator*, 156 F.2d 589 (9th Cir. 1946). The government brief in the *Reade* case raised the point that the petitioner had not appeared at the hearings on the standard as authorized under Section 701(e) and was thus barred from appeal in any capacity. The point is not raised in the opinion. Cf. *Coughlin, Trading as Diamonex Co. v. Federal Security Administrator*, N.D. Ill., 1944, as reported in *Kleinfeld & Dunn, Federal Food, Drug and Cosmetic Act; Judicial and Administrative Record 1938-1949*, p. 436 (1949).

⁵⁵ *Twin City Milk Producers Ass'n v. McNutt*, 122 F.2d 564 (8th Cir. 1941) and 123 F.2d 396 (8th Cir. 1941); *Quaker Oats Co. v. Federal Security Administrator*, 129 F.2d 76 (7th Cir.), rev'd, 318 U.S. 218 (1942); *Columbia Cheese Co. v. McNutt*, 137 F.2d 576 (2d Cir. 1943), cert. denied, 321 U.S. 777 (1944); *Willapoint Oysters, Inc. v. Ewing*, 174 F.2d 676 (9th Cir.), cert. denied, 338 U.S. 860 (1949); *Cream Wipt Food Products Co. v. Federal Security Administrator*, 187 F.2d 789 (3d Cir. 1951).

⁵⁶ *A. E. Staley Mfg. Co. v. Secretary of Agriculture*, 120 F.2d 258 (7th Cir. 1941); *Atlas Powder Co. v. Ewing*, 201 F.2d 347 (3d Cir. 1952), cert. denied, 345 U.S. 923 (1953).

⁵⁷ *Land O'Lakes Creameries, Inc. v. McNutt*, 132 F.2d 653 (8th Cir. 1943).

consumers of the standardized product, potentially encompasses 160,000,000 petitioners and could include everyone in the original groups. If the result in *Reade v. Ewing* is generally adopted, all objections to standards promulgated under Section 401 may be brought on consumer petitions. The jurisdictional standing of such a petition would, for all practical purposes, be unimpeachable, and all objections which might otherwise be raised, could be raised by the consumer-petitioner.

The only limitation set forth in the *Reade* case was that the jurisdictional allegations be "in good faith and substantial, i.e., not frivolous."⁶⁸ *Reade's* petition as a consumer was held to be in good faith, even though it was patent that his interest, in fact, stemmed from his position as a producer of a natural fortifier. The rule in *Reade v. Ewing*, strictly controlled by the courts, can be beneficial in allowing a consumer to present his case, if he is, in fact, appearing because he honestly feels that his interest has been adversely affected. However, unless the courts interpret the "good faith" requirement as excluding those who petition as consumers in order to protect their interest as producers, the decision might well open the door to a plethora of suits and lead to fraud on the courts. The *Reade* case itself does not seem to have applied the good faith limitation in a situation where it should have been utilized.

Otherwise Unfit for Food.—Another case involving an interesting procedural point, *United States v. 38 Dozen Bottles "Tryptacin,"*⁶⁹ held that a poll of 200 people as to the meaning of certain advertisements was competent evidence and was relevant in determining whether or not such advertisements were false and misleading. Any statute prohibiting false and misleading statements raises the question of "false and misleading to whom?"⁷⁰ If a product is aimed specifically at children, a poll of adults would appear to be irrelevant. And, if a product is aimed specifically at college graduates, a poll of the general public would appear to be equally irrelevant. In addition, the science of polling is in the early stage of its development and does not appear to be suited to answering the involved factual questions of the usual misbranding case brought under the Federal Food, Drug, and Cosmetic Act. However, as the science of polling does develop, the carefully controlled use of such evidence would appear to be desirable. For the present, it might be wise to restrict the use of polls to a trial without a jury, as in the present case.

⁶⁸ 205 F.2d 630, 632 (2d Cir. 1953).

⁶⁹ 114 F. Supp. 461 (D. Minn. 1953).

⁷⁰ See *United States v. 70½ Dozens of "666,"* M.D. Ga., 1944, as reported in *Kleinfeld & Dunn*, op. cit. supra note 54, at 89.

The "*Tryptacin*" case alleged the lack of adequate directions of use as required by Section 502(f)(1),⁶¹ and is another in the ever-increasing chain of decisions giving the Food and Drug Administration de facto jurisdiction over the false advertising of drugs.⁶² The court adopted the language of *United States v. Various Quantities of "Instant Alberty Food"*:

... that no drug can be said to contain in its labeling adequate directions for its use, unless every ailment of the body for which it is, *through any means*, held out to the public as an efficacious remedy be listed in the labeling, together with instructions to the user concerning the quantity and frequency of dosage recommended for each particular ailment.⁶³ (Emphasis supplied.)

Thus, for every therapeutic claim appearing in an advertisement, a concomitant statement of directions for use must appear on the labeling. Clearly, the labeling and the advertising of drugs should not be allowed to be inconsistent. However, Congress devised an over-all statutory scheme whereby the false advertising of drugs was to be controlled by the Federal Trade Commission, and co-operation between the Commission and the Food and Drug Administration seems to have been the cornerstone of the contemplated over-all regulatory scheme. By utilizing Section 502(f)(1), the courts have allowed the Food and Drug Administration to control false advertising, albeit indirectly. This "back door" approach, however desirable from the standpoint of efficient enforcement, appears to be beyond the scope of the authority granted to the Food and Drug Administration by Congress.

Whereas the "*Tryptacin*" decision seems to be unwarranted in the light of the over-all statutory scheme, *United States v. 449 Cases Containing Tomato Paste*,⁶⁴ appears to be an unwarranted restriction of the Act. Here, the court held that a showing that tomato paste was decomposed was not sufficient to prove adulteration under Section 402(a)(3), which sets forth that a food shall be deemed to be adulterated "if it consists in whole or in part of any filthy, putrid or decomposed substance, or if it is otherwise unfit for food."⁶⁵ (Emphasis

⁶¹ 52 Stat. 1050 (1938), 21 U.S.C. § 352(f)(1) (1946).

⁶² *United States v. Various Quantities of "Instant Alberty Food"*, 83 F. Supp. 882 (D.D.C. 1949); *Alberty Food Products Co. v. United States*, 185 F.2d 321 (9th Cir. 1950); *United States v. Colgrove*, 83 F. Supp. 880 (S.D. Cal. 1947), *aff'd*, 176 F.2d 614 (9th Cir. 1949), cert. denied, 338 U.S. 911 (1950); *United States v. El-O-Pathic Pharmacy*, 192 F.2d 62 (9th Cir. 1951); *United States v. Alberty Food Products*, 98 F. Supp. 23 (S.D. Cal. 1951), *aff'd*, 194 F.2d 463 (9th Cir. 1952).

⁶³ 83 F. Supp. 882, 885 (D.D.C. 1949).

⁶⁴ 111 F. Supp. 478 (E.D.N.Y.), motion for new trial denied, 113 F. Supp. 114 (E.D.N.Y. 1953).

⁶⁵ 52 Stat. 1046 (1938), 21 U.S.C. § 342(a)(3) (1946).

supplied.) The court insisted that after showing that the tomato paste was decomposed to a certain degree, the Government had the further burden of proving that tomato paste in that state of decomposition was deleterious and thus "unfit for food." The decision is against the general weight of authority, which is to the effect that Congress, in enacting Section 402(a)(3), made a finding of fact that any article of food which is filthy, putrid, or decomposed in whole or in part is unfit for food.⁶⁶ The case is now on appeal. Food that is slightly filthy, slightly putrid or slightly decomposed should be barred from the channels of interstate commerce.

Cigarettes as Drugs.—Another case, more interesting for its facts than for its contribution to the development of the law, held that certain cigarettes were misbranded drugs under the Act.⁶⁷ The crux of the definitions of both drugs and devices under the Act is the intended use to which the article is to be put.⁶⁸ In the present case, the cigarettes were held out as possessing curative value, and were rightly held to be drugs within the contemplation of the Act.

III

CONCLUSION

The Federal Food, Drug, and Cosmetic Act has a dual character that is not always recognized. In addition to being a public health law, it is a commercial law in every sense, controlling purely economic matters. The two facets of control are often inextricably interwoven, but the dual nature of the control is still present. The Act has received an extremely liberal interpretation by the courts, with extreme results being achieved under the shibboleth of protecting the public health. However, these extremes of control, acceptable where health is involved, become equally applicable in matters of pure economic control. As precedent, built on a foundation of public health, expanded to cover economic situations, the over-all commercial control achieved under the Act has become very extensive. "Undoubtedly, there are sensitive situations warranting extraordinary controls; however, in

⁶⁶ See *United States v. 1851 Cartons of "Whiting's Frosted Fish,"* 146 F.2d 760 (10th Cir. 1945), reversing 55 F. Supp. 343 (D. Colo. 1944); *Bruce's Juices, Inc. v. United States*, 194 F.2d 935 (5th Cir. 1952); *United States v. 44 Cases of Viviano Spaghetti with Cheese*, 101 F. Supp. 658 (E.D. Ill. 1951); *Korol v. United States*, 82 A.2d 129 (D.C. Munic. Ct. App. 1951); *United States v. Adler's Creamery, Inc.*, S.D.N.Y., 1950; as reported in *Kleinfeld & Dunn, Federal Food, Drug and Cosmetic Act; Judicial and Administrative Record 1949-1950*, p. 231 (1951).

⁶⁷ *United States v. 46 Cartons of "Fairfax Cigarettes,"* 113 F. Supp. 339 (D.N.J. 1953). See also *United States v. 23 Phonograph Records*, 192 F.2d 308 (2d Cir. 1951). Cf. *FTC v. Liggett & Myers Tobacco Co.*, 108 F. Supp. 573 (S.D.N.Y. 1952).

⁶⁸ 52 Stat. 1040 (1938), 21 U.S.C. § 321(g) and (n) (1946).

view of past achievements, a balance must be struck between the extension of such [all-pervasive] measures and the progressive and dynamic contributions that a responsible industry can make."⁶⁹ It is submitted, that in the interest of the health of the regulated industries, the dichotomy of control by the Act must be recognized, and the scope of the regulation of public health matters should not be allowed to determine the degree of economic control to be exercised.

⁶⁹ 1952 Annual Surv. Am. L. 280, 28 N.Y.U.L. Rev. 311 (1953).

PUBLIC HOUSING, PLANNING AND CONSERVATION

HERMAN D. HILLMAN

ALTHOUGH there was no substantial modification of existing housing legislation during the year, its continuance or alteration will likely depend on the results of several studies authorized by the Congress. The Commission on Intergovernmental Relations must report to the President by March 1, 1954, with recommendations for legislative action on (1) federal aid to states and local governments, the interrelationship of financing such aid, and the sources of financing of governmental programs; (2) the justification for such aid in the various fields, whether it should be stopped, limited, or increased; (3) the extension of such aid to fields not now covered; and (4) the ability of the Federal Government and the states to finance such activities.¹ The Housing and Home Finance Administrator was instructed to make a complete analysis and study of the low-rent public housing program and to transmit his recommendations to the House and Senate Appropriations Committees by February 1, 1954.² In addition, the report of a twenty-three-man committee appointed by the President in July, under the chairmanship of the Administrator, is expected to form the basis of an over-all federal housing policy for submission to the Congress in 1954.³

I

NATIONAL HOUSING POLICY

The housing law enacted by the Eighty-Third Congress in its first session is characterized by its short title, "Housing Amendments of 1953."⁴ These amendments, affecting primarily the FHA mortgage-insurance programs, reflect market conditions in the mortgage financing field, correct inequities and abuses, and support private development in the home construction industry.

Additional authorization of mortgage insurance, to the extent of \$3,400,000,000, became available subject to the discretion of the President to make allocations to the various FHA mortgage-insurance

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¹ Pub. L. No. 109, 83d Cong., 1st Sess. (July 10, 1953), 67 Stat. 146 (1953).

² Pub. L. No. 176, 83d Cong., 1st Sess. 10 (July 31, 1953), 67 Stat. 307 (1953), known as The Independent Offices Appropriation Act, 1954.

³ Exec. Order No. 10,486, 18 Fed. Reg. 5561 (1953).

⁴ Pub. L. No. 94, 83d Cong., 1st Sess. (June 30, 1953), 67 Stat. 121 (1953).

programs as needed.⁵ Liberalized credit terms and longer maturities for owner-occupied homes were authorized, with discretion in the president within standards to adjust such terms against the background of conditions in the building industry and the effect upon the national economy.⁶ The rigid 4 per cent limitation on insured mortgage money in the FHA co-operative, military and defense housing programs has yielded to higher maximum statutory rates (4½ per cent) in an effort to avoid market discrimination with respect to other types of FHA mortgage insurance.⁷

The so-called Wherry Act mortgage-insurance aid for privately financed rental housing at military and AEC installations has been extended for another year, to June 30, 1954.⁸ A new feature in this type of housing is the introduction of a statutory safeguard against the practice of "mortgaging out," or stated conversely, a requirement that the mortgagor have an actual investment in the housing above the proceeds of the borrowed funds.⁹ The mortgagor henceforth must agree to certify either (1) that the amount of the actual cost¹⁰ to him of the planned improvements on the property equaled or exceeded the proceeds of the mortgage, or (2) the amount by which the proceeds of the mortgage loan exceeded the actual cost of the physical improvements. In the latter event, any differential must be credited to the insured mortgage balance.

The publicly developed defense-housing program authorized in 1951¹¹ has been extended for another year, until June 30, 1954.¹² However, the extension does not include permanent housing, or loans for prefabricated housing except for commitments pre-existing June 30, 1953, or where loans outstanding on such date are being refinanced. The private part of the program, FHA mortgage insurance for housing programmed for military or defense personnel in critical defense-housing areas, has been extended to the 1954 date.

⁵ Id. § 7, 67 Stat. 123 (1953), amending Section 217 of the National Housing Act.

⁶ Id. § 3, 67 Stat. 121 (1953), adding subsection (g) to Section 203 of the National Housing Act. This authority may not provide for a mortgage in excess of \$12,000, a maturity exceeding 30 years, and must have a down payment of 5 per cent.

⁷ Id. § 6, 67 Stat. 123 (1953), amending § 213, and id. § 10(c), 67 Stat. 124 (1953), amending §§ 803(b), 908(b), of the National Housing Act. FHA has heretofore been authorized to permit interest rates up to 4½ per cent for rental housing and up to 5 per cent for sales housing.

⁸ Id. § 10(a), 67 Stat. 124 (1953), amending Section 803(a) of the National Housing Act.

⁹ Id. § 10(b), 67 Stat. 124 (1953).

¹⁰ Kickbacks, rebates and discounts may not be included in cost. Id. § 10(b)(ii), 67 Stat. 124 (1953).

¹¹ 65 Stat. 305 (1951), 42 U.S.C. § 1591(c) (Supp. 1952). See 1951 Annual Surv. Am. L. 287.

¹² Pub. L. No. 94, 83d Cong., 1st Sess. § 16(2) (June 30, 1953), 67 Stat. 125 (1953).

The resources of the Federal National Mortgage Association (FNMA), reported last year as having been extended to \$900,000,000,¹³ but limited to defense, military and disaster housing, has become available for advance commitment authorizations for over-the-counter purchases of other VA and FHA mortgages by authority of a repeal of the limiting provisions.¹⁴ The so-called one-for-one plan, by which FNMA may agree to purchase eligible mortgages from lenders in an amount equal to the amounts sold by FNMA to such lenders and to waive the statutory 50 per cent purchase restriction, has been expressly authorized by the Congress.¹⁵ The authority expires on July 1, 1954, and is limited to a total contract authorization of \$500,000,000.

II

LOW-RENT PUBLIC HOUSING

Federal Legislation.—For the third successive year,¹⁶ by limiting the number of construction starts to 20,000 dwelling units,¹⁷ the Congress has curtailed the scope of the federally aided low-rent housing program. Last year the limitations did not preclude planning for future developments provided contracts did not commit construction programs in succeeding fiscal years in excess of 35,000 dwelling units. The current restriction, however, does not permit any new agreements, contracts or other arrangements which will ultimately bind the PHA during fiscal 1954, or for any future years with respect to federal financial aids (loans or annual contributions) for any additional dwelling units, unless hereafter authorized by Congress. While this may seem superficially to indicate the beginning of the liquidation of these programs, in proper perspective the action could be one of containment pending the filing with Congress, pursuant to its direction, of the Housing and Home Finance Administrator's study of the low-rent public-housing program and his consequent recommendations on or before February 1, 1954.¹⁸

A revised formula for safeguarding local prerogatives in connection with federally aided low-rent programs was evolved by Congress during the year.¹⁹ In any community where its governing body, or

¹³ 1952 Annual Surv. Am. L. 225, 28 N.Y.U.L. Rev. 256 (1953).

¹⁴ Pub. L. No. 94, 83d Cong., 1st Sess. § 13(b) (June 30, 1953), 67 Stat. 125 (1953), amending Section 302 of the National Housing Act.

¹⁵ Id. § 12, 67 Stat. 125 (1953), amending subparagraph (E) of Section 301(a)(1) of the National Housing Act.

¹⁶ See 1952 Annual Surv. Am. L. 226, 28 N.Y.U.L. Rev. 257 (1953) (1951—50,000 units, 1952—35,000 units).

¹⁷ Pub. L. No. 176, 83d Cong., 1st Sess. 10 (July 31, 1953), 67 Stat. 307 (1953).

¹⁸ Ibid.

¹⁹ Id. at 9-10; 67 Stat. 306 (1953).

its people by referendum, have rejected such new housing, the PHA is restricted from giving any financial aid. This restriction also applies to a project under construction. In such circumstances, the local government must negotiate with the PHA for completion of the housing development or its partial or entire abandonment and must agree to repay for the abandoned undertaking all moneys expended or obligated prior to the rejecting vote or other formal action.

The unsuccessful attempt of the City of Los Angeles to terminate unilaterally its contractual obligations has been reported in this space.²⁰ The practical impasse which resulted has been broken by statutory authorization for PHA to absorb any losses where there has been a local rejection prior to July 31, 1953, and the local housing authority and the governing body agree to a modification of the co-operation agreement between those parties. The Los Angeles factual pattern fits this formula.

State Legislation.—The large number of state enactments during the 1953 legislative sessions comprised mostly matters of local interest or of a technical or corrective type. A few, however, are worthy of brief mention here. Illinois has required each tenant of a housing project to subscribe to an oath affirming that he is a citizen of the United States and of Illinois,²¹ that he is not affiliated with a subversive organization, and that he does not advocate the overthrow of the Government by force or unlawful means. Local housing authorities may not accept as a tenant any person who refuses such an oath and must evict those who have not taken such oaths by September 1, 1953. This corresponds to the federal requirements of the "Gwinn Amendment,"²² which makes ineligible for occupancy in federally aided low-rent housing any person who is a member of an organization designated as subversive by the Attorney General of the United States.

In Massachusetts, housing authorities have been authorized to construct and maintain low-rent units for elderly persons of low income.²³

Litigation.—Civil-rights cases arising out of loyalty-oath require-

²⁰ *Housing Authority v. Los Angeles*, 38 Cal.2d 853, 243 P.2d 515, cert. denied, 344 U.S. 836 (1952). See 1952 Annual Surv. Am. L. 228, 229, 28 N.Y.U.L. Rev. 259, 260 (1953); 21 Geo. Wash. L. Rev. 111 (1952). Contempt proceedings against members of the City Council for failure to comply with a writ of mandate issued by the California Supreme Court on June 27, 1952, did not succeed because the specific charge of failure was not specifically set forth in the writ. *Housing Authority v. Los Angeles*, 40 Cal.2d 682, 256 P.2d 4 (1953).

²¹ Ill. Rev. Stat. c. 67½, §§ 25, 25.01, 25.02 (1953).

²² 66 Stat. 393 (1952), 42 U.S.C.A. § 1411(c) (Supp. 1953). See 1952 Annual Surv. Am. L. 227, 28 N.Y.U.L. Rev. 258 (1953).

²³ Mass. Laws 1953, c. 668.

ments and tenancy segregation according to race varied the usual pattern of housing issues during the year.

To implement the Gwinn Amendment,²⁴ housing authorities throughout the country require applicants and tenants to sign a certificate of nonmembership in organizations appearing on the Attorney General's list. In a challenge to the constitutionality of this requirement, the regulations of the New York City Housing Authority were set aside and invalidated²⁵ as transcending the protections afforded by the Fifth Amendment to the Constitution of the United States. The court determined that the listing, without opportunity for notice and hearing, was not necessarily conclusive as to guilt, and therefore the Gwinn Amendment and the regulations using the list for its purposes were unconstitutional.

Subsequent to the making of the record in this matter, the President by executive order²⁶ revised the federal procedures governing the loyalty program. This action and the Attorney General's implemental rules²⁷ make provision for notice and hearing both to the organizations listed theretofore and for new designations. Whether such curative action is sufficient to sustain the Gwinn Amendment requirements is a question to be decided on appeal.²⁸

Two other authorities sustained their actions enforcing the loyalty requirements as to tenancy. In Illinois, the Chicago Housing Authority was upheld²⁹ on the basis of a state law³⁰ establishing loyalty to the country and the state as prerequisite for eligibility for tenancy. In the District of Columbia, the constitutional issue was not reached by the court which held³¹ that the termination of a tenancy by the giving of proper notice was within the powers of the National Capital Housing Authority and that it was not necessary that the Authority state its reasons for taking such action.

In three decisions³² the practice of segregating Negroes in one of several housing developments while excluding them from others

²⁴ See note 22 *supra*.

²⁵ *In re Peters*, 129 N.Y.L.J. 52, col. 6 (Sup. Ct., July 9, 1953).

²⁶ Exec. Order No. 10,450, 18 Fed. Reg. 2489 (1953), superseding Exec. Order No. 9835, 3 Code Fed. Regs. 129 (Supp. 1947).

²⁷ 18 Fed. Reg. 2619 (1953).

²⁸ The appeal was heard by the Appellate Division, Second Department, during the January 1954 term. Leave to file a brief *amicus curiae* was granted to the United States. 130 N.Y.L.J. 1211, col. 6 (Nov. 24, 1953).

²⁹ *Fitch v. Chicago Housing Authority*, Docket No. 53c-932, Cir. Ct., Cook County, Ill., Sept. 30, 1953.

³⁰ Ill. Rev. Stat. c. 67½, §§ 25, 25.01, 25.02 (1953).

³¹ *United States v. Rudder*, No. L & J 42349-53, D.C. Munic. Ct., Oct. 26, 1953.

³² *Banks v. Housing Authority of San Francisco*, 260 P.2d 668 (Cal. App. 1953); *Vann v. Toledo Metropolitan Housing Authority*, 113 F. Supp. 210 (N.D. Ohio 1953); *Woodbridge v. Housing Authority of Evansville*, Civil No. 618, S.D. Ind., July 6, 1953.

was held to violate the Fourteenth Amendment and to be contrary to public policy. In each of these cases the action was brought against the local housing authority. However, in an action against the Public Housing Administration, the federal agency financing the local program, to restrain it from advancing funds for a program planned to be operated on a racially segregated basis, it was held³³ that the "separate but equal" doctrine was sufficient to uphold this policy.

In Allentown, Pennsylvania, the housing authority maintained a dump on its grounds adjoining a housing development. An injury to a child resulted in a judgment for damages for negligence against the authority. On appeal, the only question certified was the governmental immunity of the housing authority for liability in tort. It was held³⁴ that since the housing authority was not required to perform the service usually performed by the city, the authority therefore was not engaged in the performance of a governmental function in the passive use of its land as a dump. The implication is clear, nevertheless, that the governmental immunity doctrine might successfully be invoked with respect to activities of the authority within the purview of the housing powers conferred upon it by the state through the enabling legislation.³⁵

A constitutional prohibition against the Commonwealth of Kentucky or any of its subdivisions becoming a stockholder in a private corporation was held³⁶ not to prohibit a housing authority from subscribing to insurance in a mutual company. A housing authority though an agency thereof is not the Commonwealth or its subdivision.

The latest decision in a long line upholding the constitutionality of state housing legislation appeared in North Dakota.³⁷ However, in a companion case, the provisions in a co-operation agreement between a city and its housing authority relating to distribution of payments in lieu of taxes and equivalent elimination of substandard housing units was held to be ultra vires and subject to injunction.³⁸

Finance.—Any doubts that interpretations of the validity and security of local housing-authority bonds backed by federal financial pledges transcended changes in political administrations were dispelled by an opinion of the Attorney General of the United States early in

³³ *Heyward v. Housing & Home Finance Agency*, 21 U.S.L. Week 2534 (D.D.C. May 5, 1953).

³⁴ *Hill v. Housing Authority of Allentown*, 373 Pa. 92, 95 A.2d 519 (1953).

³⁵ *Cf. Wickman v. Housing Authority of Portland*, 247 P.2d 630 (Ore. 1952) (sustaining governmental immunity as a defense).

³⁶ *Louisville Municipal Housing Comm'n v. Public Housing Administration*, 261 S.W.2d 286 (Ky. 1953).

³⁷ *Ferch v. Housing Authority of Cass County*, 59 N.W.2d 849 (N.D. 1953).

³⁸ *Fradet v. City of Southwest Fargo*, 59 N.W.2d 871 (N.D. 1953).

the year. In a letter to the President³⁹ the main conclusions were expressed that the United States Housing Act, as amended to date,⁴⁰ is valid and constitutional and that the faith of the United States has been solemnly pledged for payment of annual financial aid "in the same terms its faith has been pledged to the payment of its interest-bearing obligations."

The formula for determining the going federal rate of interest applicable to financial assistance contracts between the Federal Government and local housing authorities, in effect since 1937, has been changed. Under an amendment⁴¹ to Section 2(10) of the basic act,⁴² the Secretary of the Treasury will determine the minimum base rate by estimating the average yield to maturity based on daily closing-market-bid quotations during the month of May in each year on all outstanding marketable obligations of the United States having a maturity date of fifteen or more years from May 1, and by adjusting the average annual yield to the nearest one-eighth of 1 per cent. The change from coupon to yield as the basis of federal housing loans will bring such contracts closer to the actual cost of money to the Federal Government than heretofore.⁴³

In furtherance of the over-all federal fiscal policy of reducing to the maximum extent feasible direct Treasury financing activities, the Congress directed the PHA, during the fiscal year 1954, to make every effort to refund all local authority bonds held by the PHA.⁴⁴ These comprise the prewar housing issues which because of incomplete security features were not marketable to the extent of 100 per cent of capital cost and therefore the greater proportion of each issue was taken by the Federal Government. The strengthened security features afforded housing bonds by the 1949 amendments have enabled local housing authorities to market all of their securities through private underwriting to the point where private interest costs equal the federal statutory rate.

³⁹ Letter of the Attorney General to the President, *The Daily Bond Buyer* 1672 (May 20, 1953).

⁴⁰ 50 Stat. 888 (1937), 42 U.S.C. §§ 1401 et seq. (1946); 63 Stat. 414 (1949), 42 U.S.C. § 1451 (Supp. 1952).

⁴¹ Pub. L. No. 94, 83d Cong., 1st Sess. § 24(c) (June 30, 1953), 67 Stat. 128 (1953).

⁴² 50 Stat. 888 (1937), 42 U.S.C. §§ 1401 et seq. (1946); 63 Stat. 414 (1949), 42 U.S.C. § 1451 (Supp. 1952).

⁴³ This interest formula is also made applicable to federal loans for slum clearance and urban redevelopment under Title I of the Housing Act of 1949, as amended, and for college housing under Title IV of the Housing Act of 1950, as amended. Pub. L. No. 94, 83d Cong., 1st Sess. § 24(a), (b) (June 30, 1953), 67 Stat. 127 (1953).

⁴⁴ Pub. L. No. 176, 83d Cong., 1st Sess. 18-19 (July 31, 1952), 67 Stat. 315 (1953).

III

URBAN REDEVELOPMENT

In order to clear the way for the issuance of market obligations to finance local urban redevelopment programs, test suits of the constitutionality of state enabling legislation have been started in some of the state courts. A number of such suits have progressed to the point of decision with the weight of authority continuing to uphold the constitutionality of such programs.

In Ohio,⁴⁶ Illinois,⁴⁶ Maryland,⁴⁷ Rhode Island,⁴⁸ Oregon⁴⁹ and the District of Columbia,⁵⁰ decisions were reached that the taking of slums and financing of clearance constituted public benefits and so dominated the undertaking as to outweigh private benefits accruing to the redevelopers of the cleared sites. The public benefits therefore were considered sufficient to sustain the public use of the taking and the public purpose of the appropriation of public funds.

However, in Georgia⁵¹ and Florida⁵² such laws were stricken by the highest courts of those states because the ultimate private use of the cleared slums was considered to characterize the purpose of the taking.

While the constitution of New York specifically authorizes slum-clearance undertaking by public bodies,⁵³ a property owner challenged the classification of his property as substandard and insanitary. The gravamen of the allegations was that the plaintiff's property was not substandard, but was included in an over-all area containing substandard properties in order to obtain needed frontage for a con-

⁴⁶ State ex rel. Bruestle v. Rich, 159 Ohio St. 13, 110 N.E.2d 778 (1953). The constitutional issue did not present the same difficulties encountered by this court in the housing cases. Cf. Columbus Metropolitan Housing Authority v. Thatcher, 140 Ohio St. 38, 42 N.E.2d 437 (1942); Dayton Metropolitan Housing Authority v. Evatt, 143 Ohio St. 10, 53 N.E.2d 896 (1944); In re Cincinnati Metropolitan Housing Authority, 155 Ohio St. 590, 99 N.E.2d 761 (1951), 1951 Annual Surv. Am. L. 292. See also McDougal & Mueller, Public Purpose in Public Housing: An Anachronism Reburied, 52 Yale L.J. 42 (1942).

⁴⁷ People ex rel. Gutknecht v. Chicago, 414 Ill. 600, 111 N.E.2d 626 (1953). This case is distinguished from prior approving adjudications in that it upholds the taking for redevelopment purposes of blighted vacant land. People ex rel. Tuohy v. Chicago, 399 Ill. 551, 78 N.E.2d 285 (1948); Chicago Land Clearance Comm'n v. White, 411 Ill. 310, 104 N.E.2d 236 (1952); Zurn v. Chicago, 389 Ill. 114, 59 N.E.2d 18 (1945).

⁴⁸ Herzinger v. Baltimore, 98 A.2d 87 (Md. 1953).

⁴⁹ Ajootian v. Providence Redevelopment Agency, Equity No. 2122, R.I. Sup. Ct., Aug. 11, 1952.

⁵⁰ Foeller v. Housing Authority of Portland, 256 P.2d 752 (Ore. 1953).

⁵¹ Schneider v. District of Columbia, Civil No. 5791-52, D.D.C., Nov. 5, 1953.

⁵² Housing Authority of Atlanta v. Johnson, 209 Ga. 560, 74 S.E.2d 891 (1953).

⁵³ Adams v. Housing Authority of Daytona Beach, 60 So.2d 663 (Fla. 1952).

⁵⁴ N.Y. Const. Art. XVIII.

vention hall site. In a split decision,⁵⁴ the New York Court of Appeals denied that the property owner had a right to a trial of the issue as to whether the site classification was proper. The court relied on the familiar doctrine that in the absence of fraud or irregularity, the findings of an administrative body may not be upset if the record contains a basis for the determination.

Two volumes on this topic appeared during the year.⁵⁵ Space limitations make any kind of review impractical.

IV

PUBLIC, WAR AND VETERANS HOUSING

These World War II programs continue to be administered under statutory authority for liquidation.⁵⁶ However, by executive order of the President⁵⁷ and implemental regulations of the Housing and Home Finance Administrator,⁵⁸ deadline dates for perfecting applications to the Federal Government for transfer or relinquishment to local government were extended. The final removal date for temporary housing, July 1, 1954, remains unchanged. The New York emergency-housing program for veterans is also in the final stages of liquidation under authority of an enactment requiring vacation by September 30, 1953, and removal or disposal by the end of the year.⁵⁹

V

PLANNING

The spilling of population from urban to suburban and rural areas during the postwar years has largely been into a planning vacuum, except where powers of zoning, subdivision control, promulgation of master plans and enforcement of building codes subject to jurisdictional limitations have been invoked to sustain the public interest. Evaluation of some of these expedients has now begun to appear⁶⁰ and the results of tests of the constitutionality of municipal ordinances are sprinkled generously through the reporters. The New

⁵⁴ *Kaskel v. Impellitteri*, 306 N.Y. 73, motion for stay and reargument denied, 306 N.Y. 609 (1953); accord, *Oliver v. City of Clairton*, 374 Pa. 333, 98 A.2d 47 (1953); *Save Our Homes Council v. Planning Board*, Docket No. L-8220-51, N.J. Super. Ct., Essex County, March 4, 1953.

⁵⁵ Woodbury, *The Future of Cities and Urban Redevelopment* (1953); Woodbury, *Urban Redevelopment: Problems and Practices* (1953).

⁵⁶ 54 Stat. 1127 (1940), 42 U.S.C. § 1541 (1946).

⁵⁷ Exec. Order No. 10,462, 18 Fed. Reg. 3613 (1953).

⁵⁸ 18 Fed. Reg. 4043 (1953); 18 Fed. Reg. 7271 (1953).

⁵⁹ N.Y. Laws 1953, c. 175.

⁶⁰ Mell, *Subdivision Control in Wisconsin*, [1953] Wis. L. Rev. 389; Note, *An Analysis of Subdivision Control Legislation*, 28 Ind. L.J. 544 (1953).

Jersey Supreme Court has handed down a significant decision which upholds a zoning ordinance establishing minimum-size requirements for new dwellings.⁶¹ While the court obviously was influenced by the newly revised New Jersey Constitution which confers upon municipalities broad discretion in zoning, the case is significant because of the overtones of aesthetic and economic considerations which represent a departure from the traditional relationships of the police power to health, welfare, morals and safety of the community.

VI

CONSERVATION

The prolonged dispute over control of offshore oil resources was settled by the President's approval of the Submerged Lands Act vesting title in the states.⁶² Though a phase in the dispute is thus ended, the commencement of litigation by nonlitoral states to contest the constitutionality of the statute indicates a continuance of the controversy.⁶³

Another issue of long standing also seems on the way to solution. The joint undertaking between New York State and the Province of Ontario for development of the power resources of the St. Lawrence River has been approved by presidential order vesting necessary authority in the New York State Power Authority.⁶⁴ In addition, further efforts to constitute the seaway development a joint enterprise of the two countries seem likely. However, Canada is now prepared to "go it alone."⁶⁵

The Western law reviews published representative articles on the law of conservation which are noted below.⁶⁶ The Missouri Basin Survey Commission has published its findings in book form, presenting

⁶¹ *Lionshead Lake, Inc. v. Township of Wayne*, 10 N.J. 165, 89 A.2d 693 (1952), appeal dismissed, 344 U.S. 919 (1953). See Haar, *Zoning for Minimum Standards: The Wayne Township Case*, 66 Harv. L. Rev. 1051 (1953).

⁶² Pub. L. No. 31, 83d Cong., 1st Sess. (May 22, 1953), 67 Stat. 29 (1953).

⁶³ The Submerged Lands Act has been challenged by filing of suits by the State of Arkansas, N.Y. Times, July 9, 1953, p. 49, col. 1, and by the State of Rhode Island, N.Y. Times, Dec. 22, 1953, p. 36, col. 1.

⁶⁴ Exec. Order No. 10,500, 18 Fed. Reg. 7005 (1953); N.Y. Times, Nov. 6, 1953, p. 1, col. 3. A major statement of policy placing major responsibility for development of power in local, public or private enterprise was issued by the Department of Interior, N.Y. Times, Aug. 19, 1953, p. 1, col. 3.

⁶⁵ See 1952 Annual Surv. Am. L. 234-35, 28 N.Y.U.L. Rev. 265-66 (1953).

⁶⁶ Coates, *Present and Proposed Legal Control of Water Resources in Wisconsin*, [1953] Wis. L. Rev. 256; Dykstra, *Federal Government, State Governments, and Natural Resources*, 37 Minn. L. Rev. 569 (1953); Williams, *Conservation and the Constitution*, 6 Okla. L. Rev. 155 (1953); Lewis, *Effective Date of Forced Unitization Orders*, 27 Tulane L. Rev. 457 (1953); Murphy, *The Unit Operation of Oil and Gas Fields: III*, 28 Notre Dame Law. 73 (1952).

in comprehensive treatment the problem of how a policy to handle the development of the land and water resources of the Missouri Basin should emerge.

VII

CONCLUSION

Housing policies were not changed substantially during the year, but the second session of the Eighty-Third Congress is expected to be the clearing point for the evaluation and policy studies conducted during 1953. While the constitutionality of urban redevelopment can now be said to have been sustained by the weight of authority, no final decision has yet been reached on loyalty-oath requirements and racial segregation in connection with public-housing occupancy. In general, government seems to become increasingly engaged in these fields because of the need to achieve desirable social and economic consequences in the public interest.

LOCAL GOVERNMENT

WILLIAM MILLER

THIS survey of developments in the law of local government covers two years rather than one. It spans the turbulent political period encompassed within 1952 and 1953. These years may well be marked, in the perspective of the future, as the renaissance of ethical standards in American public life. Beyond the public press and political campaigns, the case law, legislation and literature of the biennium carried notable contributions to the moral tone of federal, state and local government.¹ Developments of special state interest may be found in a growing number of annual surveys in the law journals.²

I

FEDERAL-STATE RELATIONS

A comprehensive review of the relationships between the federal, state and local governments was initiated by the creation of the Commission on Inter-Governmental Relations, by an act of Congress upon President Eisenhower's recommendation.³ Meanwhile, Congress has followed its earlier precedent in the insurance field⁴ by turning over marginal oil lands, the so-called tidelands, to state management and control.⁵ Congress also consented to a compact between the States of

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¹ Graham, *Morality in American Politics* (1952); *Ethical Standards in American Public Life*, *Annals* (March 1952); *Driscoll v. Burlington-Bristol Bridge Co.*, 8 N.J. 433, 86 A.2d 201 (1952); *International City Managers Ass'n, The City Manager's Code of Ethics*, 34 *Public Management* 218 (1952); *N.J. Laws 1953*, c. 259 (forfeiture of public office upon refusal to testify or to waive immunity).

² Allcorn, *Municipal Corporations*, 7 *Rutgers L. Rev.* 77 (1952); Ball, *Local Government Law*, 6 *Vand. L. Rev.* 1206 (1953); Hall, *Municipal Corporations*, 4 *Mercer L. Rev.* 106 (1952); Kerstetter, 1953 *State Legislation Affecting Municipalities*, 35 *Public Management* 198 (1953); Miller, *Local Government, Survey of New York Law*, 27 *N.Y.U.L. Rev.* 940 (1952); Shestack, *Local Government*, 12 *La. L. Rev.* 164 (1952); Sonensfield, *Municipal Corporations (Survey of Ohio Law—1952)* 4 *W. Res. L. Rev.* 244 (1953); Comment, *Who Will Watch the Watchman?*, 41 *Nat. Munic. Rev.* 280 (1952); Note, *Municipal Corporations (Survey of Ill. Law for 1951-52)*, 30 *Chi-Kent L. Rev.* 113 (1952).

³ *Pub. L. No. 109*, 83d Cong., 1st Sess. (July 10, 1953). In general see Guandolo, *Federal Payments to States and Local Governments Respecting Property of the United States*, 101 *U. of Pa. L. Rev.* 509 (1953); Zimmerman & Wendell, *Congress: A Second Umpire of the Federal System*, 40 *Geo. L.J.* 499 (1952); Hamilton & Demming, *Congressional Legislation of Municipal Interest*, *Am. Munic. Ass'n Mimeo.* (Aug. 19, 1953).

⁴ 59 Stat. 33 (1945), 15 U.S.C. § 1011 (1946), which overcame the effect of the Supreme Court's decision that insurance was interstate commerce by returning the industry to state regulation. Cf. *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944).

⁵ *Submerged Lands Act*, *Pub. L. No. 31*, 83d Cong., 1st Sess. (May 22, 1953).

New York and New Jersey, known as the Waterfront Commission Compact for the creation of an interstate agency to exercise the police power of the two states to purge criminal elements from the shipping business—usually thought to be in interstate and foreign commerce.⁶

II

STATE-LOCAL RELATIONS

Home Rule.—The biennium under review should also go down in history as a time of striking revival of interest in local self-government generally, and in the legal forms of effectuating the political theory.⁷ New charters were adopted or took effect during this period in the cities of New Orleans, Philadelphia and Newark, and a special commission proposed important changes in the charter of the City of New York. In New York also, the Legislature has adopted a complete revision of the optional county government law, replacing with four basic plans a considerable variety of county charters which have been available under the old law but which have been used very little.⁸

While some twenty-one states now provide constitutional home rule for local government, in one form or another, the majority of states still look to legislative means of providing a measure of local self-government. The decision of the New Jersey Supreme Court upholding the state's Optional Municipal Charter Law is thus of special

⁶ N.Y. Laws 1953, c. 882, as amended by c. 883, and N.J. Laws 1953, c. 202, as amended by c. 203, to which Congress consented by Pub. L. No. 252, 83d Cong., 1st Sess. (August 12, 1953). In general see N.Y. State Crime Comm'n Fourth Report, Legis. Doc. No. 70 (1953); Hearings before Sub-Committee No. 3 of the Committee on the Judiciary on H.R. 6286, 6321, 6343 and Sen. 2383, 83d Cong., 1st Sess. (New Jersey—New York Waterfront Commission Compact, 1953); Sen. Rep. No. 653, 83d Cong., 1st Sess. (1953) (Interim Report of the Committee on Interstate and Foreign Commerce entitled "Waterfront Investigation: New York—New Jersey").

⁷ Some of the many articles on the subject include the following: Atkins, *New County Plans Offered*, 41 Nat. Munic. Rev. 288 (1952); Dilworth, *Philadelphia Home Rule Charter*, 56 Dick. L. Rev. 137 (1952); Friedmann, *The Legal Status and Organization of the Public Corporation*, 16 Law & Contemp. Prob. 576 (1951); Greenwood, *Powers of Municipal Corporations—Including Home Rule*, 22 Tenn. L. Rev. 480 (1952); Merrill, *Constitutional Home Rule for Cities—Oklahoma Version*, 5 Okla. L. Rev. 139 (1952); Snider, *American County Government: A Mid-Century Review*, 46 Am. Pol. Sci. Rev. 66 (1952); White, *Constitutional Changes in Matters of Home Rule and Municipal Government*, 25 Temp. L.Q. 428 (1952); Notes, *Delegable Powers and the District of Columbia: An Old Problem in a New Setting*, 21 Geo. Wash. L. Rev. 337 (1953); *Montana Municipalities: Local Self Government*, 13 Mont. L. Rev. 43 (1952); *County Home Rule in Tennessee*, 5 Vand. L. Rev. 812 (1952). Rhode Island and Louisiana adopted new home-rule amendments to their respective constitutions. In 1949, Pennsylvania had for the first time enacted enabling legislation to authorize Philadelphia to act under that state's "home rule" clause which had lain dormant since it was added to the constitution in 1922.

⁸ N.Y. Laws 1952, c. 834, known as "Alternative County Government Law."

importance.⁹ That state does not have a home-rule clause in its constitution. The statute confers powers of local government by the method of general grant, rather than specific enumeration, but this aspect of the legislation was not under review.

The main test in the New Jersey court was upon the use of a charter commission to select from among the optional plans provided in the state law, and to provide for the submission of one of those plans following a charter study. It was contended, with some support from New Jersey precedents, that this was a delegation of legislative power to the charter commission. The court accepted a view set forth in the legislative commission's report, recommending the enactment of the Optional Municipal Charter Law, which held "that the charter commission being specially elected by the people for the purpose of making this preliminary choice and providing for the submission of the question of ultimate adoption, does not in any sense constitute an act which intervenes between the will of the people and the will of the Legislature, but is rather a means of expressing the will of the people by preliminary referendum."¹⁰

Meanwhile, the American Municipal Association took another step to push forward the cause of constitutional home rule.¹¹ The present report and draft of model constitutional provisions does not go so far as the previous effort of the Association which was directed toward the notion of "local federalism."¹² In fact, it is notable that the current version does not mention the previous report except by way of a bibliographical reference in the appendix. The basic theory of the new draft is to retain legislative control over the powers and functions of local government, but to require this legislative control to be exercised by an affirmative limitation in the charter or general law. This is similar to the freeholders' charters in California. The proposed draft would recognize the further possibility, however, that certain legislative powers would be nondelegable for the purposes of local government, such as the power to legislate on matters of private law. Except for this limitation, it is proposed to abandon the familiar distinction between state affairs and municipal affairs. As the report itself states:

⁹ *Bucino v. Malone*, 12 N.J. 330, 96 A.2d 669 (1953). The New Jersey constitution of 1947 does not provide for constitutional home rule, although it does establish a procedure of special legislation upon local request and purports to reverse the usual rule that doubts against the existence of a power shall be resolved against the municipality. N.J. Const. Art. IV, § 7, §§ 10, 11 (1947). Neither of these paragraphs was involved in the instant case.

¹⁰ *Id.* at 340, 96 A.2d at 674.

¹¹ Fordham, *Model Constitutional Provisions for Municipal Home Rule*, Committee on Municipal Home Rule, Am. Munic. Ass'n (1953).

¹² See Mott, *Home Rule for American Cities*, Am. Munic. Ass'n (1949).

There is no question but that the draft does not go as far in its grant of home rule powers as many advocates of home rule would like. It does not place any substantive powers and functions beyond legislative control by general law. The theory of the draft is not to create an *imperium in imperio* with municipal freedom from legislative control, but to leave a charter municipality free to exercise any appropriate power or function except as expressly limited by charter or general statute. This emphatically reverses the old strict-constructionist presumption against the existence of municipal power and, so long as the legislature does not expressly deny a particular power, renders unnecessary petitioning the legislature for enabling legislation.¹³

The importance of the proposed departure from the dichotomy of state and municipal affairs is illustrated by a timely opinion of the Colorado Supreme Court overruling a thirty-three-year-old decision of the same court which had previously held that telephone service rendered by a public utility in the City and County of Denver, and the rates to be charged therefor, were matters "local and municipal" to the city and were proper subjects for the exercise of the city's regulatory power under the home-rule article of the Colorado constitution.¹⁴ That article authorizes a home-rule city to adopt a charter, "which shall be its organic law and extend to all its local and municipal matters . . . [and] in such matters shall supersede . . . any law of the state in conflict therewith." The court now holds that the regulation of intracity business of the telephone company is not a matter of local and municipal concern, and that such regulation rests exclusively with the state public utilities commission.¹⁵ Despite a vigorous dissent, based mainly on the desirability of stability in the law, it may at least be said that the new decision is in accord with the great weight of authority.¹⁶ Elsewhere, the home-rule idea has continued to find favor in the courts.¹⁷

It is a truism that there can be no real local self-government, under constitutional home rule or otherwise, without local self-support. The author has explored this aspect of the subject in connection with

¹³ Fordham, *supra* note 11, at 20.

¹⁴ Colo. Const. Art. XX, § 6 (1876).

¹⁵ *People v. Mountain States Tel. and Tel. Co.*, 125 Colo. 167, 243 P.2d 397 (1952).

¹⁶ The court in the present case expressly declared that "it does not necessarily follow that the services of all public utilities, functioning in whole or in substantial part within a municipality, must be thus classified" (as a state concern). *Id.* at 172, 243 P.2d at 399. See, in accord, the analysis by Mott, *supra* note 12, at 38.

¹⁷ *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100 (1953) (delegation of local legislative power to the District of Columbia upheld); *State ex rel. Bruetle v. Rich*, 159 Ohio St. 13, 110 N.E.2d 778 (1953) (urban redevelopment is within the "home rule" power provided by the Ohio constitution); and see *State ex rel. Kansas City v. North Kansas City*, 360 Mo. 374, 228 S.W.2d 762 (1952). (home rule powers extend to annexation under Missouri Constitution).

a review of state-aid policies.¹⁸ In a provocative article on the same subject, a practicing political scientist offers this conclusion:

The fact that in many of the social services, and in other local services as well in the target areas, there are standards below which the nation and the states cannot permit the local government to fall should not imply that these exigencies cannot be met without losing integrity, unity and self-reliance within the institutions of local administration.¹⁹

III

AREAS, ORGANIZATION AND ADMINISTRATION

Corporate Changes.—In recent years, there has been a greater interest in municipal annexations and consolidations than in many decades.²⁰ This gives a notable quality to developments in this field which at other times might be passed by as a reiteration of established law. For example, it has been held that where two municipalities annex the same land, the annexation prior in point of time will control,²¹ and a general power to annex territory will not imply authority to annex part of an adjacent municipality.²² A considerable body of literature is concerned with the problems and effect of corporate changes, particularly annexation.²³

The requirement of contiguity of consolidating municipalities was reaffirmed in Illinois in connection with the ill-fated attempt to provide for the consolidation of Champaign and Urbana in that state. In the present case, the court held that this rule should be given a practical and common sense construction. It therefore declined to apply the rule of the *Morgan Park* case,²⁴ although it appeared that the cities

¹⁸ Miller, *State Aid and the State Fiscal Problem*, National Tax Ass'n Proc., 46th Annual Conf. (1953); cf. McMillan, *State Supervision of Municipal Finance* (U. of Texas 1953).

¹⁹ Egger, *Nature Over Art: No More Local Finance*, 47 Am. Pol. Sci. Rev. 461, 476 (1953).

²⁰ See Bollens, *Metropolitan Fringe Area Development*, in *Municipal Yearbook* 33 (1953). Even the historically conservative Borough of Princeton and Township of Princeton, in New Jersey, voted on the question of municipal consolidation. See Joint Consolidation Committee of the Borough of Princeton and the Township of Princeton, *Approved Plan and Report* (1953). But they voted it down in both municipalities at the general election in November 1953.

²¹ *People ex rel. Forde v. Town of Corte Madera*, 115 Cal. App.2d 32, 251 P.2d 988 (1952).

²² *State ex rel. Village of Friorley v. City of Columbia Heights*, 53 N.W.2d 831 (Minn. 1952).

²³ *Hughes v. Parish Council of East Baton Rouge*, 48 So.2d 823 (La. App. 1950), 25 A.L.R.2d 852 (1952); Maruszewski, *Legal Aspects of Annexation as It Relates to the City of Milwaukee*, [1952] Wis. L. Rev. 622; Comment, *Annexation by Municipalities in Georgia*, 2 Mercer L. Rev. 423 (1951); Note, *Municipal Annexation and Detachment in Nebraska—An Analysis and a Proposal for Revisions*, 32 Neb. L. Rev. 43 (1952); Kneier, *Book Review*, 47 Am. Pol. Sci. Rev. 559 (1953).

²⁴ *Morgan Park v. Chicago*, 255 Ill. 190, 99 N.E. 388 (1912) (where annexation

of Champaign and Urbana had each looped their boundary lines in an opposite direction around a cemetery tract with the result that some forty acres of cemetery land were enclosed by the boundaries of the two cities which were not common for a distance of about 870 feet.²⁵

The political nature of the annexation question was emphasized in a Pennsylvania decision. Here the question was not concerned with the constitutionality of the statute, but rather with the extent of judicial review of an ordinance of annexation of a school district. The court expressly overruled anything in its prior decisions which might be construed to be contrary to the rule that the decision as to the effect of annexation upon a school district is exclusively committed to the state council of education.²⁶

Forms of Government.—Stemming largely from experience in California, there has been a growing interest in a modification of the strong-mayor plan of municipal government to include a chief administrative officer, or so-called CAO, to assist an elected mayor to carry out the administrative functions of his office. This has been proposed for the City of New York, and appears in one form or another in new charters adopted by New Orleans, Philadelphia and Newark.²⁷

Commission Government.—Meanwhile, the New Jersey court has struck down the practice of creating "park bench commissioners" in the assignment of powers and duties to the respective commissioners, by the board of commissioners under the commission-form-of-government law.²⁸ Under the New Jersey statute, the board of commissioners is required to assign all the powers and duties of the city government among the five commissioners "as it may deem appropriate." The basic question before the court was whether discretion exercised by the board of commissioners under this language was subject to judicial review. Parenthetically, it should be observed that prior to 1927 the courts, under somewhat different language, had assumed to determine what was an assignment to an appropriate department, but the Legislature amended the act in 1927 for the specific purpose of precluding

resulted in an unincorporated island surrounded by the new municipality; held, non-contiguous).

²⁵ People ex rel. Montgomery v. Lierman, 415 Ill. 32, 112 N.E.2d 149 (1953).

²⁶ Appeal of Borough of Irwin, 171 Pa. Super. 256, 90 A.2d 365 (1952).

²⁷ Bollens, Appointed Executive Local Government (1952); Graybiel, Book Review, 5 Stan. L. Rev. 899 (1953); Report of the Temporary State Commission to Study the Organizational Structure of the Government of the City of New York, Four Steps to Better Government of New York City—A Plan for Action (1953); Charter Commission of the City of Newark, New Jersey, Final Report of the Newark Charter Commission (1953); Philadelphia Charter Commission, Report to the Voters by the Philadelphia Charter Commission (1951); Charter Committee for the City of New Orleans, Final Draft of the Home Rule Charter (1952).

²⁸ Grogan v. DeSapio, 11 N.J. 308, 94 A.2d 316 (1953)

such exercise of judicial discretion. The state supreme court now holds that where there is a bona fide exercise of discretion to achieve the purposes of the commission-form-of-government law, the courts will not review; but where the action of the board of commissioners is taken without a bona fide exercise of the delegated legal discretion, the court will set the action aside, even though it will not attempt to exercise the discretion delegated to the commissioners. In the present case, it was held that the record indicated a complete lack of any exercise of discretion, and an arbitrary determination to strip two of the commissioners of any governing authority regardless of any reasonable administrative purposes under the commission form of government. The decision is a substantial contribution to the law of commission government in New Jersey, and may furnish a good guide to courts of other states where a similar problem is known to exist to a lesser degree.

In other cases of infrequent occurrence, and therefore worthy of note, the courts have reiterated the rule that where a quorum is present a majority of those voting may carry an issue,²⁹ and that the powers of a department head to remove a subordinate,³⁰ or to abolish a position entirely³¹ require notice and hearing only where the statute requires that procedure, as in the case of civil service personnel. In the organization and administration of local health services, moreover, there is a growing trend toward complete statutory regulation of the establishment and operation of local health departments.³²

Public Authorities.—While the principal decisions affecting governmental authorities are discussed under the heading of Indebtedness, a survey of the year would be incomplete without some reference to the continuing ferment of opinion on the pros and cons of public authorities as a device for organizing governmental power and providing governmental services. Much that has been written during the year has been concerned with the federal government corporations, but a comprehensive compilation of public authorities within the states has also been published.³³ Speaking of authorities generally, however,

²⁹ *Meixell v. Borough Council of Hellertown*, 370 Pa. 420, 88 A.2d 594 (1952).

³⁰ *Williams v. City Manager of Haverhill*, 110 N.E.2d 851 (Mass. 1953).

³¹ *Hanley v. Murphy*, 255 P.2d 1 (Cal. 1953).

³² *Stahl & Earley, The Pennsylvania Local Health Administration Law of 1951*, 13 U. of Pitt. L. Rev. 232 (1952); U.S. Dep't of Health, Education and Welfare, *State Laws Governing Local Health Departments* (1953).

³³ *The Council of State Governments, Public Authorities in the States* (1953). See *McCutcheon v. State Building Authority*, 13 N.J. 46, 97 A.2d 663 (1953). U.S. Dep't of Commerce, Bureau of Public Roads, 27 Pub. Roads No. 4 (Oct. 1952); Seidman, *The Theory of Autonomous Government Corporation*, 12 Pub. Admin. Rev. 89 (1952); Pennsylvania, Bureau of Munic. Affairs, Dep't of Internal Affairs, *Municipal Authorities Act of 1945* (1952); Goldberg & Seidman, *The Government Corporation: Elements of a Model Charter*, Pub. Admin. Serv. (1953).

it may be well to repeat the caveat recently expressed by the Executive Director of the Port of New York Authority, especially in these times of pressures for costly new public improvements:

... may I suggest, also, that an authority should not be created simply to replace the normal functions of the established bureaus or divisions of government; nor to lull the public into a belief that the activity is self-supporting when in reality it is subsidized; nor solely as a device to avoid debt limitations.⁸⁴

Public Records.—The extent to which so-called public records shall be open to public inspection, in the interest of better municipal administration, has long been a subject of considerable controversy. In legal contemplation, if a record is in fact public it is and should be open to inspection during reasonable business hours. The difficulty arises when the record has elements of a nonpublic character, even though it is bought with taxpayers' funds. In at least one case, a municipality procured data from private employers, upon a pledge not to divulge it, for the purpose of measuring the compensation of municipal employees. In a subsequent action, the employees sought inspection of this data. The highest court of California has held that the material took on a confidential character in view of the pledge made at the time it was received, and that disclosure would, therefore, be denied.⁸⁵

In the assessment process, similarly, the courts sometimes recognize the data compiled by an assessor as his "work product" and exempt this data from the rule of public inspection. An effort was made to extend this exemption to reappraisal cards made by outside appraisers pursuant to contract at public expense. The court held that these cards are not public records, but neither are they the "work product" of the assessor, and inspection was allowed to enable the preparation of a tax appeal against the assessment district.⁸⁶ The entire subject has been re-examined in a worthy work published under the sponsorship of the American Society of Newspaper Editors.⁸⁷

IV

POWERS: GENERALLY

Public Relations Campaign.—The intriguing question of expenditures by public bodies to influence a vote on a pending public question has once again arisen in New Jersey. The present case involved a

⁸⁴ Tobin, *Authorities as a Governmental Technique: An Address before the Third Annual Institute of the New Jersey Council for Social Studies and the Bureau of Governmental Research at Rutgers University* (1953).

⁸⁵ *San Francisco v. Superior Court of San Francisco*, 38 Cal.2d 156, 238 P.2d 581 (1951).

⁸⁶ *Tagliabue v. North Bergen Township*, 9 N.J. 32, 86 A.2d 773 (1952).

⁸⁷ Cross, *The People's Right to Know: Legal Access to Public Records and Proceedings* (1953).

referendum on a school bond issue. In this connection a booklet was prepared and paid for by the township board of education to provide all of the relevant facts upon which the voters might form their judgment, but it also contained several "vote yes" exhortations, and a dramatized portrayal of the dire consequences to follow if the bond election was not favorable. The court held that the power to spend money for the printing and distribution of an informational booklet may be necessarily and fairly implied from the express power to provide for the building, enlarging, repairing or furnishing of a school house. In the case at bar, the court found that seventeen pages of an eighteen-page booklet fairly presented the facts pro and con. To the extent that the expenditure went beyond such a presentation and exhorted the voters to vote favorably on the bond issue, however, it exceeded the implied power of the district. As the court stated, "The public funds entrusted to the board belong equally to the proponents and opponents of the proposition. . . ." Thus the expenditure for the public relations booklet was unauthorized, but it did not vitiate the election.⁸⁸

V

POWERS: POLICE POWER GENERALLY

Each year, the case law, legislation and literature produce some choice specimens of the application of the police power which are hardly novel but are nevertheless worthy of note. At least one journal carried an excellent review of the methods of investigating municipal corruption.⁸⁹ Our purpose here, as confined by space limitations, is to note at least some of the more timely developments in the police-power field.

Public Utilities.—In the discussion of home rule, reference has already been made to the decision of the Colorado Supreme Court holding that intracity telephone business was not subject to regulation by the City and County of Denver, under its home-rule power, thereby reversing a precedent of thirty-three years standing. While this decision would be hailed by public utilities in that state, the Illinois court, contrary to a New York decision of the same year, has held that the construction of a subway system by the City of Chicago is an exercise of a governmental, rather than proprietary, function and that the city may therefore compel the public utilities to remove and relocate facilities at their own expense. The same case also held that the city would

⁸⁸ *Citizens to Protect Public Funds v. Board of Education of Parsippany-Troy Hills Township*, 13 N.J. 172, 98 A.2d 673 (1953).

⁸⁹ Comment, *Methods of Investigating Municipal Corruption*, 20 U. of Chi. L. Rev. 717 (1953).

not be liable in tort to a public utility for damages to its franchises by reason of the same construction.⁴⁰

Foreign Commerce.—It is not often that the municipal police power may come in conflict with the exclusive regulation of foreign commerce which is vested in Congress by the United States Constitution. In opposition to a taxicab licensing ordinance, however, it was contended that the petitioners were engaged solely in the transporting of passengers from Mexico to San Diego County in California. The Supreme Court held that the operation of taxicabs across national boundaries is so closely related to local regulation that nondiscriminatory regulation of all taxicabs may not be considered a burden upon the privilege of doing interstate or foreign commerce.⁴¹ In another notable decision limiting the scope of municipal police power, however, the Court extended the guarantees of the First and Fourteenth Amendments to motion pictures.⁴²

Licenses for Revenue.—As in past years, the courts have not hesitated to apply the rule that a license fee must be reasonably related to the subject and cost of licensing. If it goes beyond such a sum, it then becomes a tax and may not be applied without power to levy a tax on the particular subject. Cases of this kind reached the courts of last resort in at least four states, and were prominent in other states as well.⁴³

Business Regulations Generally.—While we are reminded that municipal licensing ordinances must set up adequate standards to guide administrative discretion,⁴⁴ and that the power to regulate does not imply the power to prohibit entirely,⁴⁵ a wide variety of regulatory measures have been upheld. Ordinances relating to the surrender of unclaimed impounded animals for medical research, to regulate trailer camps, motels and plumbers, to provide for the demolition of deteriorated and dilapidated buildings, to control air pollution, all received judicial approval by courts of last resort.⁴⁶ A wide variety of other

⁴⁰ *Peoples Gas Light & Coke Co. v. Chicago*, 413 Ill. 457, 109 N.E.2d 777 (1952).
Contra: *In re Gillen Place, Borough of Brooklyn*, 304 N.Y. 215, 106 N.E.2d 897 (1952).

⁴¹ *Buck v. California*, 343 U.S. 99 (1952).

⁴² *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

⁴³ *Salomon v. Jersey City*, 12 N.J. 379, 97 A.2d 405 (1953); *Walker v. City of Morgantown*, 71 S.E.2d 60 (W. Va. 1952); *Minneapolis Street Ry. v. Minneapolis*, 236 Minn. 109, 52 N.W.2d 120 (1952); *Olan Mills, Inc. v. City of Sharon*, 371 Pa. 609, 92 A.2d 222 (1952).

⁴⁴ *Drexel v. City of Miami Beach*, 64 So.2d 317 (Fla. 1953).

⁴⁵ *Commonwealth v. Rivkin*, 329 Mass. 586, 109 N.E.2d 838 (1952).

⁴⁶ *Simpson v. Los Angeles*, 253 P.2d 464 (Cal. 1953); *R. C. Allinder v. City of Homewood*, 254 Ala. 525, 49 So.2d 108 (1950); *Courembis v. District of Columbia*, 193 F.2d 18 (D.C.Cir. 1951); *Thrifty Hardware & Supply Co. v. Phoenix*, 71 Ariz. 21, 222 P.2d 994 (1950); *Soderfelt v. City of Drayton*, 59 N.W.2d 502 (N.D. 1953); *State v. Mundet Cork Corp.*, 8 N.J. 359, 86 A.2d 1 (1952) (air pollution ordinance upheld).

regulatory ordinances was the subject of comment in the journals.⁴⁷

Topsoil Ordinances.—Two new topsoil cases were decided during the biennium under review. In Massachusetts, where some of the most substantial decisions upholding the power to regulate topsoil removal have been handed down, the court pointed out that all its previous decisions, except one, were rendered under conditions where the regulation was accomplished by means of a zoning bylaw. A 1949 amendment to the Massachusetts statutes was intended to enable municipalities to regulate topsoil removal without setting up any zoning system. In the one nonzoning case, the Massachusetts court had previously held such power to be beyond the authority delegated under the then existing statutes. The court now holds that the enabling legislation of 1949 fully sustains the exercise of the police power with respect to topsoil removal even though the municipality may not have adopted a zoning regulation.⁴⁸

In a similar case of first impression in New Jersey, there was no specific enabling legislation to authorize the topsoil ordinance. The court found the delegation of power in the general welfare clause of the municipal charter (in this case a general statute conferring many different municipal powers) sufficient as interpreted in light of the provisions of the New Jersey Constitution that acts concerning municipalities shall be liberally construed in their favor.⁴⁹ It is notable that the New Jersey court does not refer to the Massachusetts case which held that a topsoil ordinance was not authorized by the general municipal police power.⁵⁰

Presumption of Proof Established by Ordinance.—In a case of first impression in Utah, the court of last resort in that state has

⁴⁷ Comment, *Municipal Corporations—Regulation of Billboards and Advertising Structures for Esthetic Purposes*, 35 Marq. L. Rev. 365 (1952); Notes, *Municipal Regulation and Taxation of Trailers and Trailer Camps under Pennsylvania Law*, 57 Dick. L. Rev. 338 (1953); *The Problem of the Sound Truck*, 2 Utah L. Rev. 65 (1950); Chapman & Field, *Indiana Licensing Law* (Bureau of Gov't Research, Dep't of Gov't, Indiana U. 1953); Parsons, *The Use of the Licensing Power by the City of Chicago*, 33 Ill. Studies in the Social Sciences Nos. 2-3 (1952); Rhyne, C. S. & B. W., *Municipal Regulation of Signs, Billboards, Marquees, Canopies, Awnings and Street Clocks—Model Ordinance Annotated* (Nat. Institute of Munic. Law Officers 1952); U.S. Dep't of Commerce, Bureau of Public Roads, *Model Traffic Ordinance* (1953); U.S. Dep't of Health, Education and Welfare, *1953 Recommendations of the Public Health Service, Milk Ordinance and Code* (1953).

⁴⁸ *Butler v. East Bridgewater*, 110 N.E.2d 922 (Mass. 1953).

⁴⁹ *Fred v. Mayor and Council of Borough of Old Tappan*, 10 N.J. 515, 92 A.2d 473 (1952). Such an ordinance was also sustained under the zoning power in *Ohio. Miesz v. Mayfield Heights*, 113 N.E.2d 20 (Ohio App. 1952).

⁵⁰ *Town of North Reading v. Drinkwater*, 309 Mass. 200, 34 N.E.2d 631 (1941). The New Jersey court found support in the leading Massachusetts decision, *Town of Burlington v. Dunn*, 318 Mass. 216, 61 N.E.2d 243, cert. denied, 326 U.S. 739 (1945).

applied the strict construction theory to arrive at the conclusion that a city has no power to provide by ordinance that the presence of a vehicle parked in violation of the ordinance shall be prima facie evidence that the registered owner of such vehicle committed or authorized such violation.⁵¹ The court considered the presumption a rule of evidence and was unable to find that the power to establish such a rule by ordinance had been delegated to cities either expressly or by necessary or fair implication as an incident to the express power to regulate traffic. Most other states in which the question has arisen have been able to read into the express power to regulate traffic an implied power to establish by ordinance the presumption of commission or permission from the fact of ownership. While the cases are too numerous to permit a re-examination of the question at this late date, much could be said for the position of the Utah court from the viewpoint that the matter of proof of guilt on the basis of evidence is not a subject upon which the state legislature may delegate its legislative power for purposes of local government.⁵²

VI

POWERS: STREETS AND TRAFFIC

The choking character of urban traffic problems has pressed public officials everywhere to seek every available means for a solution. Every reasonable device has been considered to regulate on-street parking and to assist in financing of off-street parking facilities.⁵³ Under such pressures for results, established rules of law are likely to be tortured in the process, regardless of the subject matter.

Trust in Public Street.—In these circumstances, it is timely to re-emphasize the trust character of the municipal title to public streets. The general rule is strong that a municipality cannot alienate its streets voluntarily or lose title to them or any part of them by adverse possession. Even where a mistake is made and private improvements are erected in the bed of a public street, the municipality is not estopped to compel removal of the obstruction. This rule is so strong that the Oregon court was recently moved to overrule a prior decision to the contrary.⁵⁴

Contract to Enforce Parking Meter Ordinance.—The use of parking meters is conventionally sustained as an exercise of the police power. This does not mean that the purchase of the parking meters

⁵¹ *Nasfeli v. Ogden City*, 249 P.2d 507 (Utah 1952); 3 Utah L. Rev. 382 (1953).

⁵² See Freund, Legislative Regulation 24 et seq. (1932).

⁵³ See Levin, Parking Meters, Their Number, Revenue and Use, Am. Munic. Ass'n, Highway Research Board, U.S. Bureau of Public Roads (1953).

⁵⁴ *City of Molalla v. Coover*, 192 Ore. 233, 235 P.2d 142 (1951), 31 Ore. L. Rev. 176 (1952).

by the municipality is also an exercise of the police power. In its nature, the contract does not differ from the purchase of squad cars for the police force. In North Carolina a town purchased parking meters under a contract whereby the price was payable solely from meter receipts. The contract also obligated the town to enact and enforce parking ordinances providing for the established meter charges for parking until the price of the parking meters was paid. Upon a subsequent repeal of the parking ordinance by a new administration, it was argued that the contract was invalid because it purported to limit the town's control over its streets. The court held that the making of the contract was a proprietary activity, and thus could bind subsequent municipal councils. This alone was an unfortunate view of the authorities. But the court went on to declare that under the North Carolina statute, which is in the usual form, "municipalities are authorized to engage in the business of providing parking space for automobiles . . . with a charge for the occupation of the space in the streets opposite the meters."⁵⁵

It is to be hoped that this characterization, by Judge John J. Parker, of the regulation of on-street parking as a business in which the municipality is in effect selling space for parking in the streets, will not be extended. It is reminiscent of the old wagon thills case,⁵⁶ where the City of New York was held liable in tort because it had granted a permit for a grocer to keep a wagon tied up in the street in front of his store. If cities are going into the business of renting curb space, rather than exercising the police power to solve the parking problem, they may well be required to charge an increased parking meter fee for vehicles with a longer wheel base, such as large trucks, and might also find it profitable to issue yearly leases to mobile vendors of all kinds. Once the principle is established as a matter of law, it is too likely to find new and unforeseen applications in legislative halls.

Other cases have continued to uphold the use of parking meters on the conventional theories of police power, even though substantial revenue may be realized, where the charge amounts to the usual nominal fee.⁵⁷ While it is often difficult to trace parking meter revenues directly into traffic control expenditures, any fiction involved

⁵⁵ *Town of Graham v. Karpark Corp.*, 194 F.2d 616 (4th Cir. 1952), 14 Ohio St. L.J. 110 (1953).

⁵⁶ *Cohen v. Mayor of New York*, 113 N.Y. 532, 21 N.E. 700 (1889).

⁵⁷ *City of Roswell v. Mitchell*, 56 N.M. 201, 242 P.2d 493 (1952); *City of Hutchinson v. Harrison*, 244 P.2d 222 (Kan. 1952); *State v. Douglas*, 94 A.2d 403 (Vt. 1953); cf. *State v. Scoggin*, 236 N.C. 1, 72 S.E.2d 97 (1952) (equal protection denied by meter time varying from maximum parking time established by ordinance). See Note, 6 Vand. L. Rev. 907 (1953).

in the police-power theory is certainly less objectionable than any theory of licensing the use of space at the street curb for private purposes. The alternative of off-street parking facilities is considered under the heading of local services, which follows.

Certainly the use of on-street parking meter revenues to assist in the financing of off-street parking facilities is an answer to the question of disposition of the regulatory fee deposited in the parking meter. Unfortunately, this also leads to covenants to continue to exercise the police power through the maintenance of control by parking meter ordinances. In one of the current cases, such a pledge of on-street meter revenues to assist in the financing of off-street parking facilities was held invalid. The court stated that the arrangement was in effect, an effort "to lease or let the whole system of on-street parking meters for operation by a private corporation or individual," even though the method of financing was expressly authorized by the enabling statute.⁵⁸ If there had been no covenant to continue parking meters this position would have been untenable. Taking the view that off-street parking facilities are a business when carried on by the municipality, the same court held that a fine of \$1.00 for parking on a parking lot without depositing the coin in the meter was an invalid effort to use the police power "in furtherance of an undertaking purely proprietary in nature." It apparently did not occur to the court that a municipality may impose a fine for unlawful use of public property. Decisions such as these leave no alternative but to haul away the overtime parker.

VII

POWERS: LOCAL SERVICES

Quality of Services Offered throughout a Municipality.—One of the most difficult legal problems in municipal services, upon which authorities are scarce, is presented when the residents of one area of a municipality are not offered the same degree and kind of services offered in another area. Where conditions warrant, differences in service levels may be achieved through the establishment of special districts which limit the area of assessment for capital and operating expenses as well as the area of service. When a service is supported by general taxation, however, it may also be impractical to offer an absolute equality of service throughout the municipality. While the courts will accept a pragmatic view of this problem, a deliberate denial of equal service has been set aside as an unconstitutional denial of equal protection of the laws.

In the instant case, a township had refused the plaintiff's ap-

⁵⁸ Britt v. City of Wilmington, 236 N.C. 446, 73 S.E.2d 289 (1952).

plication for extension of the township's water mains unless the property owner agreed to pay the cost of construction of the new mains and also accepted certain minimum lot-size restrictions upon his land. It was held that the township governing body had discretion to establish the municipal services which would be rendered, but it could not vest in itself arbitrary power to grant or withhold consent to the extension of the service to persons similarly situated by reference to "wholly alien considerations related to planning and zoning." The exercise of the latter functions, the opinion adds, must necessarily follow the pertinent enabling statute.⁵⁹ The decision underscores the importance of recognizing that municipal governing bodies exercise both legislative and administrative powers, and, as to the latter, they may not reserve the same kind of discretion which is open to them in the case of the former.

Private Purpose.—The frequent informal practice in some municipalities of using public equipment and personnel to resurface private driveways in the summer or to remove snow from them in the winter has been tested in a significant New Hampshire decision. The majority opinion of the court recognizes the rule that public property may not be used for private purposes. It draws an analogy, however, to the cases upholding the power of a municipality to lease parts of a municipal building, not needed for municipal purposes, for stores or offices. From these cases it reasons that where the paving and plowing services "are subordinate and incidental to town needs, and the prices charged are sufficient to cover the cost so that no burden falls on taxpayers," the town may perform either or both of the services in question.⁶⁰

The difficulty with the court's opinion is that it fails to recognize the necessity of public purpose, as pointed out in the dissent of Chief Justice Kenison, as a first requirement in the rendering of a municipal service.⁶¹ The fact that there is reimbursement of the cost of the service does not convert it from a private purpose to a public purpose. The fact that the town can perform the service economically and efficiently does not make it a public purpose. The fact that the town has surplus time for its equipment and personnel does not invest driveway service with a public purpose any more than the use of police squad cars to substitute for taxis would be considered a public pur-

⁵⁹ Reid Development Corp. v. Parsippany-Troy Hills Township, 10 N.J. 229, 89 A.2d 667 (1952); cf. Magnolia Development Co. v. Coles, 10 N.J. 223, 89 A.2d 664 (1952).

⁶⁰ Clapp v. Town of Jaffrey, 97 N.H. 456, 91 A.2d 464 (1952).

⁶¹ State ex rel. Gordon v. Rhodes, 156 Ohio St. 81, 100 N.E.2d 225 (1951); 1951 Annual Surv. Am. L. 257. State v. Gage County, 154 Neb. 822, 49 N.W.2d 672 (1951) (county may not sell to general public crushed rock produced by county quarry).

pose. As a practical matter, moreover, the administrative dangers in diverting a municipal road department to the service of individual property owners without any standard to determine who shall receive the service, are so patent as to justify a strict judicial examination of any arrangement of this kind.⁶²

Industrial Plant Subsidies.—Another form of private benefit from public expenditures has been vigorously denied by the Arkansas Supreme Court. In an alarming growth of the use of public capital for private purposes, municipalities in various parts of the nation have been issuing industrial plant bonds to contribute to the cost of factory buildings, as a means of securing the location of new enterprise within the municipality. Only the shortness of public memory prevents these schemes from being immediately condemned by the experience of history with similarly well-intentioned railroad aid bonds.⁶³ The opinion of the Arkansas court holds that not only is an ordinance authorizing the industrial bonds unconstitutional, but the enabling legislation as well also violates the rule that public funds may not be used for private purposes.⁶⁴ This does not mean, however, that in providing public facilities a municipality may not be motivated by the needs of nearby industry, even outside the municipality, for transportation services. Accordingly, the operation of a municipal bus system has been held to come within the meaning of "public project" as used in enabling legislation.⁶⁵

Off-Street Parking Facilities.—The whole question of public purpose is brought into sharp focus in connection with public acquisition of off-street parking facilities. This has been one of the most pressing problems of municipal officials in urban areas everywhere, and sound administration seems to dictate the need for public facilities in many places. The law has not lagged far behind. Upon adequate proof of traffic and street congestion, the public purpose nature of off-street parking facilities has been upheld.⁶⁶ But the practical necessity of nonparking revenues to make some off-street facilities self-supporting has not impressed the courts as a justification for the use of the power of condemnation to acquire land for a public parking garage, where the plans called for the use of not more than 25 per cent of the floor

⁶² See Princeton Surveys, Village of South Orange, N. J.: A Study of Municipal Services and Finance 64 (1943): "... no public street department should do private work, either with or without reimbursement."

⁶³ See Hillhouse, Municipal Bonds: A Century of Experience (1953) passim.

⁶⁴ Williams v. Harris, 215 Ark. 928, 224 S.W.2d 9 (1949).

⁶⁵ Chrisman v. Cumberland Coach Lines, 249 S.W.2d 782 (Ky. 1952).

⁶⁶ Gate City Garage v. Jacksonville, 66 So.2d 653 (Fla. 1953); Michigan Boulevard Building Co. v. Chicago Park District, 412 Ill. 350, 106 N.E.2d 359 (1953).

area for stores which would provide rental income for the parking facility.⁶⁷

Extraterritorial Utility Rate Discrimination.—The Texas Supreme Court has affirmed, by a five-to-four decision, the judgment of its lower court that a municipality which acquires a water and sewer service private utility corporation which is already serving residents of the city and adjacent nonresidents may not discriminate in its rate charges as between residents and nonresidents of the city.⁶⁸ As noted in a previous *Survey*, this decision should be distinguished from the situation where a municipality sells "surplus" of a public utility designed primarily to serve its own residents.⁶⁹

Housing.—Developments in housing and urban redevelopment are omitted here for the reason that they are the principal subject of an article elsewhere.⁷⁰

Schools.—Developments peculiar to school law are also omitted, due to space limitations, since specialized publications in the field of education are readily available.

VIII

OFFICERS AND EMPLOYEES

Elections.—This was a period of unusual activity in litigated election cases, associated with the general election of 1952. For example, it was held that the time for holding an election is directory only and may be postponed by the election officers where there is a snow storm of unusual severity.⁷¹ When official ballots run short, ballots which were originally printed as sample ballots may be cast in the election.⁷² In Georgia, the court has held that under the state's "county unit system" a political party primary is not an election within the constitutional guarantees of the right to vote.⁷³

This was also a time of notable deviations from the usual party

⁶⁷ *Shizas v. Detroit*, 333 Mich. 44, 52 N.W.2d 589 (1952); cf. *Midtown Motors, Inc. v. Public Parking Authority of Pittsburgh*, 372 Pa. 475, 94 A.2d 572 (1953). A statute prohibited the parking authority from engaging in auto accessory supply or repair service. It was held that it could not authorize its lessee to do so, even though the statute authorized letting part of first floor for "commercial use." Accord, *Clark v. Public Parking Authority of Pittsburgh*, 372 Pa. 481, 94 A.2d 576 (1953).

⁶⁸ *City of Texarkana v. Wiggins*, 246 S.W.2d 622 (Tex. 1952), affirming 239 S.W.2d 212 (Tex. Civ. App. 1951), 101 U. of Pa. L. Rev. 160 (1952); 7 Miami L.Q. 266 (1953); 10 Wash. & Lee L. Rev. 72 (1953).

⁶⁹ See 1951 Annual Surv. Am. L. 255-56, commenting upon the Texas case, *supra* note 68, and upon *City of Englewood v. Denver*, 123 Colo. 290, 229 P.2d 667 (1951).

⁷⁰ Public Housing, Planning and Conservation, *supra* p. 326.

⁷¹ *State v. Marcotte*, 89 A.2d 308 (Me. 1952).

⁷² *Gibson v. Bower*, 73 S.E.2d 817 (W. Va. 1952).

⁷³ *Cox v. Peters*, 208 Ga. 498, 67 S.E.2d 579 (1951), appeal dismissed, 342 U.S. 936 (1952).

loyalties. In Alabama, for example, it was held that a primary candidate for presidential elector may not be required to take an oath, as a condition to becoming a candidate, that he will aid and support the nominees of the national convention of the Democratic party for president and vice-president of the United States. The United States Supreme Court reversed.⁷⁴ And in New Jersey, it was held that a primary election is not voided where some of those persons voting in the primary were not, as required by statute, compelled to sign and file a declaration of party affiliation before being permitted to vote.⁷⁵ The whole subject of voting by servicemen, both in primary and general elections, was considered in a very worthwhile report.⁷⁶

The powers and duties of election officers were, of course, litigated with greater frequency due to the general activity in elections. In one such case, it was held that precinct election officers have the exclusive power, in the first instance, to count ballots and certify the results, and that a state board of canvassers cannot bypass the precinct officers.⁷⁷ In New York, moreover, the court jolted election officials by reminding them that an action would lie against them for damages by a candidate who is aggrieved by the action of an election board in arbitrarily declaring a valid nominating petition to be invalid.⁷⁸

Dual Officeholding.—Election activities also produced an unusually large number of cases on the subject of dual officeholding. Most often they were the result of an individual trying to protect himself by holding on to one office until he could learn whether he had been elected to another. In New York, it has been held that a candidate may not accept a nomination for both district attorney and county judge. Since the two offices would be incompatible, the court reasoned that a dual nomination would, in effect, deprive the voters of an effective vote for one office or the other.⁷⁹ The sense of this decision is illustrated in another which resulted in a member of a city council being held to have vacated his office when he was elected and qualified as a justice of the peace.⁸⁰ Similarly, a petitioner who retained the office of municipal judge was held ineligible to the office of mayor and, therefore, could not question the validity of an election

⁷⁴ Ray v. Blair, 57 So.2d 395 (Ala.), rev'd, 343 U.S. 154, 214 (1952).

⁷⁵ Wene v. Meyner, 13 N.J. 185, 98 A.2d 573 (1953).

⁷⁶ Voting in the Armed Forces, H.R. Doc. No. 407, 82d Cong., 2d Sess. (1952), 46 Am. Pol. Sci. Rev. 512 (1952).

⁷⁷ State ex rel. Thompson v. Fry, 71 S.E.2d 449 (W. Va. 1952).

⁷⁸ Schwartz v. Heffernan, 304 N.Y. 474, 109 N.E.2d 68 (1952), 39 Va. L. Rev. 234 (1953).

⁷⁹ Burns v. Wiltse, 303 N.Y. 319, 102 N.E.2d 569 (1951), 16 Albany L. Rev. 242 (1952). But cf. Grace v. Boggs, 55 So.2d 45 (La. App. 1951).

⁸⁰ State v. Millsop, 76 S.E.2d 737 (W. Va. 1953); State ex rel. Atkins v. Fortner, 236 N.C. 264, 72 S.E.2d 594 (1952).

for mayor in which he had been a candidate.⁸¹ The rule is so rigid that moneys paid out to a municipal judge who was ineligible for that office because he already held the office of mayor, may be recovered for the public treasury upon the suit of a taxpayer.⁸² In order to avoid a disturbing result, at least one court has held that a superintendent of schools in a small school district was not an officer within the meaning of a statute excluding public officers from serving on a county board of education, but that he was merely a public employee.⁸³

Loyalty Oaths.—The developments on this subject are omitted here for the reason that they appear elsewhere in the article on Constitutional Law and Civil Rights.⁸⁴

Public Trust.—Two decisions of unusual importance in defining the scope of the official trust have been handed down by the Supreme Court of New Jersey. In one, a county prosecutor has been held subject to indictment for nonfeasance in office, even though the indictment does not allege a corrupt or evil motive.⁸⁵ The significance of the case lies in its vigorous assertion of a positive and primary duty of law enforcement by a county prosecutor, including the detection, apprehension, arrest and conviction of offenders against the law. The duty once established, it follows that an indictment would lie for nonfeasance. A conviction under such an indictment would, of course, indicate a similar procedure with respect to the local chief of police where the unprosecuted crime was committed. The decision readily suggests the possibility that other public officers who have been of the opinion that their duties were discretionary might also be subject to indictment for failure to act, under the common-law rule approved by the majority opinion.⁸⁶

Following the decision, incidentally, most county prosecutors undertook campaigns to suppress so-called charitable games of chance, including bingo. This was, in part, responsible for the enactment and adoption of a constitutional amendment to legalize bingo and raffles when conducted by certain religious, charitable and civic organizations.

In a second opinion by the same court,⁸⁷ reaffirming the trust nature of public office, Chief Justice Vanderbilt sets forth the doctrine that technical compliance with statutory requirements will not protect

⁸¹ *Lesieur v. Lauseir*, 96 A.2d 585 (Me. 1953).

⁸² *Revis v. Harris*, 219 Ark. 586, 243 S.W.2d 747 (1951).

⁸³ *Maddox v. State*, 220 Ark. 762, 249 S.W.2d 972 (1952); Glasser, A New Jersey Municipal Law Mystery: What is a "Public Office"?, 6 Rutgers L. Rev. 503 (1952).

⁸⁴ N.Y.U.L. Rev. 64 (1954).

⁸⁵ *State v. Winne*, 12 N.J. 152, 96 A.2d 63 (1953).

⁸⁶ Citing Stephen, Digest of the Criminal Law art. 145 (8th ed. 1947).

⁸⁷ *Driscoll v. Burlington-Bristol Bridge Co.*, 8 N.J. 433, 86 A.2d 201, cert. denied, 344 U.S. 838 (1952).

corruption in public office from the processes of civil law. Most briefly stated, the case in question involved the scheme of a group of promoters to sell at a substantial profit to themselves two privately owned bridges to a county bridge commission to be created under the political domination of the same promoters. In a fifty-seven-page opinion carefully analyzing the record and the applicable law, Chief Justice Vanderbilt develops the facts of the transactions whereby a syndicate was formed for the purchase of two bridges from private bridge companies, how the county governing body was persuaded by one of the members of the syndicate, the county political boss, to create a county bridge commission without any opportunity to understand the implications of what they were doing, and how less than an hour from the time of their organization the newly appointed bridge commissioners had put through all the details of a \$12,000,000 transaction of which they were totally ignorant only eighteen hours before, and about which they had no information or advice other than that furnished them by the sellers.

From the record, it appeared that this was all part of a common scheme and in the language of the trial court it was plain that the commissioners had acted "with a celerity which can only be attributed to a total abrogation of independent investigation or judgment." A background factor which is not emphasized in the opinion of the court was the fact that had the bridges remained in private ownership they could, under the statute, have been condemned by the state under a statutory formula for a price which would have been less than half of the price at which the bridges were purchased by the county bridge commission. A civil action was brought by Governor Alfred E. Driscoll, under a special provision of the New Jersey Constitution of 1947, to have the entire transaction rescinded. In deciding the case in favor of the plaintiff, the chief justice set down a standard of morality for public office which accounts in part for the opening paragraph of this article. Writing of the fiduciary character of public officers, he declared:

As fiduciaries and trustees of the public weal they are under an inescapable obligation to serve the public with the highest fidelity. In discharging the duties of their office they are required to display such intelligence and skill as they are capable of, to be diligent and conscientious, to exercise their discretion not arbitrarily but reasonably, and above all to display good faith, honesty and integrity. [citing cases] They must be impervious to corrupting influences and they must transact their business frankly and openly in the light of public scrutiny so that the public may know and be able to judge them and their work fairly. When public officials do not so conduct themselves and discharge their duties, their actions are inimicable to and inconsistent with the public interest, and not only are they individually deserving of censure and

reproach but the transactions which they have entered into are contrary to public policy, illegal and should be set aside to the fullest extent possible consistent with protecting the rights of innocent parties.⁸⁸

Following a review of the availability of a taxpayer's suit, a proceeding instituted by the governor, or by the attorney general, as well as the prerogative writs which became a matter of right under the New Jersey Constitution of 1947, the court pointed out that citizens have it "in their power to end the misconception of some public officials that their obligations are fully met so long as they obey the letter of the law and avoid its penal sanctions." The opinion of the court states:

In order to hold the transaction here involved against public policy and therefore illegal, it is not necessary that there be a showing that the statutory procedure for the creation of a bridge commission and the purchase by it of bridges was not technically followed. . . . It is sufficient, therefore, that it be proven that the board of chosen freeholders and the bridge commission which it created abnegated their positions of public trust and the duties imposed upon them by law by failing to exercise their discretion in good faith and on fair and intelligent consideration free from corrupting influences.⁸⁹

In the same case the court reviews the status of purchasers of revenue bonds issued by the bridge commission as part of the complicated series of transactions. In this respect, the decision and the judgment rendered give every possible protection to holders in due course and reaffirm the protection afforded bond purchasers by their reliance on recitals appearing on the face of the bonds. The court applied the doctrine of estoppel by recitals to all purchasers except those who were involved in the original promotion of the scheme. In rendering a complicated judgment in light of the facts, the court followed the principle that "where rescission is prayed for and is warranted by the facts, but cannot be decreed because of the intervening equities of innocent third parties such as the bondholders here, under general principles of equity the court may require the wrongdoers to account for their profits so that as nearly as may be the parties will be protected and equity done. . . ." Accordingly, the bridge commission was permitted to retain title to the bridges, subject to the court's supervision, and the members of the selling syndicate were required to disgorge their profit by repaying to the commission over \$3,000,000 representing the gross profit which they realized in the transaction.

⁸⁸ Id. at 474, 86 A.2d at 221.

⁸⁹ Id. at 475, 86 A.2d at 222.

IX

INDEBTEDNESS

The past two years have seen continued pressure for the extension of revenue financing in order to relieve the growing burden of taxation which has plagued taxpayer and public official alike throughout the nation. In the financing of off-street parking facilities, especially, difficult legal problems have been presented.

Public Purpose.—Reference has already been made to the growing problem of industrial development bonds.⁹⁰ This use of public credit to finance factories erected for rental to private enterprise gives such enterprise the added advantage of exemption from federal taxation of the securities which are issued. Any effort to eliminate such tax exemption will, of course, run into the established opposition to federal taxation of interest on municipal bonds. This and other effects of state plans for the use of municipal borrowing power to induce business location, in Alabama, Illinois, Kentucky, Mississippi and Tennessee, are reviewed in a current comment.⁹¹

Revenue Financing.—Although it has upheld the constitutionality of the State Turnpike and Highway Authority Acts, the New Jersey Supreme Court has invalidated the State Building Authority Act. It was held that the bonds of the authority would, in effect, be payable out of taxation since rentals payable by the state for office space and other types of space would be the income out of which the authority would pay its indebtedness. Such indebtedness cannot be incurred, the court held, without a popular referendum, under the provisions of the New Jersey Constitution.⁹² The decision is apparently contrary to an earlier Pennsylvania holding, and casts doubt on lease-purchase agreements in New Jersey.

Revenue Financing of Parking Facilities.—In at least three recent cases, the courts have passed upon the validity of combining on-street and off-street parking meter revenues to finance off-street parking facilities. Such an arrangement was upheld in Colorado,⁹³ Ohio,⁹⁴ and Florida⁹⁵ but was held invalid in North Carolina.⁹⁶ Another aspect

⁹⁰ See note 62 *supra*.

⁹¹ Note, 66 Harv. L. Rev. 898 (1953). On municipal bonding in general see National Municipal League, A Model County and Municipal Bond Law (1953).

⁹² *McCutcheon v. State Building Authority*, 13 N.J. 46, 97 A.2d 663 (1953); cf. *Protsman v. Jefferson-Craig Consolidated School Corp.*, 109 N.E.2d 889 (Ind. 1953) (lease-purchase agreement between school district and school building corporation does not create a debt of the district); *Behnke v. New Jersey Highway Authority*, 13 N.J. 14, 97 A.2d 647 (1953) (state guarantee of highway authority's debt does not constitute a loan of state credit within constitutional prohibition).

⁹³ *Brodhead v. City and County of Denver*, 247 P.2d 140 (Colo. 1952).

⁹⁴ *State ex rel. Gordon v. Rhodes*, 156 Ohio St. 128, 107 N.E.2d 206 (1952).

⁹⁵ *Gate City Garage Co. v. Jacksonville*, 66 So.2d 653 (Fla. 1953).

⁹⁶ *Britt v. City of Wilmington*, 236 N.C. 446, 73 S.E.2d 289 (1952).

of the North Carolina case has already been considered under the heading of Powers: Streets and Traffic. For present purposes, it should be emphasized that the decision appears to turn upon the use of a covenant to continue to exercise the police power through the maintenance of control by parking meter ordinances. Such a covenant obviously parallels the provisions commonly found in revenue financing of municipal utilities. Its extension to the regulation of traffic, an exercise of the police power as distinguished from a proprietary enterprise, is difficult to reconcile with any established concept of municipal powers. This will lead either to the position that on-street parking meters are a proprietary enterprise, as in Judge Parker's opinion previously referred to, or the abandonment of such covenants. In either event, this is an illustration of the shortcomings of revenue financing where there is no other objective than the avoidance of debt limitations.

Fiscal Agents.—At least two cases have narrowly restricted the functions which may be performed by fiscal agents and advisers. In Florida, the City of Miami was enjoined from disposing of a \$27,000,000 bond issue on the ground that the sale to its fiscal agent and adviser was against public policy and therefore void.⁹⁷ The case involved the financing of the city's sewerage system improvement program, as part of which the city had entered into a contract with the First Boston Corporation to act as its fiscal agent and adviser on all matters pertinent to the bond issue. There was no question as to the necessity and value of such services. The statute, moreover, authorized the sale of the bonds at private sale. The sole question presented was whether such private sale could be made to the fiscal agent pursuant to a provision of a contract that the city would negotiate with it "in the first instance for the sale of the bonds" and that there would be no charge for the advisory services in the event that the bonds were purchased by the fiscal agent. The court held that the contract by the city "to sell its bonds to its agent, advisor and employee is contrary to public policy . . . and therefore void." To arrive at this conclusion, the court followed two lines of reasoning: first, that the fiscal agent could not serve two masters in achieving the lowest net interest rate for the city on the one hand and the highest net interest rate for itself as a purchaser on the other; and second, that the fiscal agent was an employee of the city and therefore could not lawfully have an interest in any contract with it under the common statutory prohibitions. While the public policy argument is difficult to square with the practical necessities of the financial market, it is at least a persuasive approach to the problem. The argument

⁹⁷ Miami v. Benson, 63 So.2d 916 (Fla. 1953).

that a fiscal adviser becomes an employee of the municipality, however, is obviously contrary to all the experience of independent contractors who provide either professional services or work or materials to public bodies.

In the Florida case, there was no question that the municipality had power to engage a fiscal agent and adviser to provide guidance to the governing body in obtaining the most favorable market for its sewerage revenue bonds. In a Mississippi case, however, the court further limited the scope of a contract for such services by holding that it was ultra vires for a city to agree to authorize a fiscal agent to procure necessary legal and engineering services required in connection with the bond issue, and to pay a fee therefor, or to pay for a guarantee of the sale of such bonds in advance of the bond referendum. In accord with established principles, the court held that it was a delegation of the power of the governing body to authorize the fiscal agent to select the legal and engineering advisers. Such delegation was not expressly authorized by the enabling statute, and it would not be implied from a provision authorizing the municipality "to do all things and perform all acts necessary, proper, or desirable to effectuate the full intent and purpose of the act."⁹⁸ While these two decisions will cause sound fiscal advice to appear as an independent element of cost in bond issuance proceedings, they demonstrate a policy of the courts to favor the competitive bond market over the convenience of arrangements for private sale.

X

PUBLIC WORKS, PURCHASING AND CONTRACTS

Beyond these contracts relating to fiscal agents, developments of the period under review were mainly a synthesis of established principles. In this respect, it is most noteworthy that there has finally appeared the first book devoted to the presentation of the law of municipal contracts with primary emphasis upon a set of annotated forms.⁹⁹

Appropriation Requirement.—Although the requirement of a prior appropriation to support any expenditure pursuant to contract

⁹⁸ *J. L. Love Co. v. Town of Carthage*, 65 So.2d 568 (Miss. 1953). In this case the contract was fully executed on both sides, but the decree allowed recovery, upon a taxpayer's suit, of the sum paid to the fiscal agents less such an amount as on discovery and an accounting might appear to have been reasonably and necessarily expended by the appellants in the performance of the contract. The decree did not affect the validity of the bond issue which had been purchased by the fiscal agents at public sale upon sealed bids.

⁹⁹ *The Law of Municipal Contracts with Annotated Model Forms*, Nat. Institute of Munic. Law Officers' (Rhyne ed. 1952); Book Reviews, Brown, 55 W. Va. L. Rev. 80 (1952); Rava, [1953] Wash. U.L.Q. 228; Saloom, 27 Tulane L. Rev. 259 (1953).

is well established, the cases continue to reflect some lack of care in this regard in daily practice. The rule is so firm that it applies even where the city derives power to purchase and finance voting machines directly from the state constitution.¹⁰⁰ While the authority to incur indebtedness may stem from the constitution, the manner in which it may be incurred may still be controlled by charter provisions for budgeting and prior appropriation. Similarly, where a city charter provision required the purchasing agent to "purchase all supplies for the city," it has been construed by the Massachusetts court to prevent a city governing body from authorizing one of the aldermen to contract for the purchase of parking meters.¹⁰¹

Duration of Contract.—While the cases are not clear as to the permissible period for which a municipality may contract, the distinction between governmental and proprietary functions has served to delineate those subjects of contract upon which the governing body may bind its successors. On this basis, the Florida court was able to uphold the validity of a contract by which the city gave the operator of a wrecking and towing business the exclusive right for five years to keep the streets cleared of wrecks, derelicts and other impediments to traffic.¹⁰² The long duration which is common in utility franchises, moreover, was permitted to extend to an exclusive right to collect garbage for a fee from the individual property owners. Unfortunately, the court held that the contract, which ran for twenty-five years, was not a public contract or a franchise within the meaning of the city charter, and the public was denied the protection which goes with the award of such long-term agreements.¹⁰³

Quasi-contractual Liability.—The courts have continued to grope for a solution to the conflict between the principles of unjust enrichment and the protection of the public interest, where contracts prove to be ultra vires or otherwise unenforceable. The basic rule that there can be no recovery under an ultra vires contract was applied to deny a payment of rental for certain parking areas.¹⁰⁴ Similarly, where the contract for road servicing and garbage collection was void due to the interest of a public officer, the municipality may recover the money paid upon such a contract.¹⁰⁵ But under similar circumstances other courts declined to apply the rule rigidly where the contract has been executed, and seek to determine whether there has been any unjust

¹⁰⁰ *Kingsley v. Denver*, 247 P.2d 805 (Colo. 1952).

¹⁰¹ *Haffner v. Director of Public Safety of Lawrence*, 110 N.E.2d 369 (Mass. 1953).

¹⁰² *Daly v. Stokell*, 63 So.2d 644 (Fla. 1953).

¹⁰³ *Ponti v. Burastero*, 112 Cal. App.2d 846, 247 P.2d 597 (1952).

¹⁰⁴ *Greene v. City of Danville*, 350 Ill. App. 440, 113 N.E.2d 348 (1953).

¹⁰⁵ *Crass v. Walls*, 259 S.W.2d 670 (Tenn. App. 1953); cf. *J. L. Love Co. v. Town of Carthage*, 65 So.2d 568 (Miss. 1953).

enrichment.¹⁰⁶ In these cases, the court declines relief to the public treasury apparently upon the basis that it would be unconscionable in equity.

Interest Liability.—The question whether a public authority is liable for the payment of interest at the legal rate, in the absence of contract or statutory provision, has been determined in Florida. The United States Court of Appeals for the Fifth Circuit has held that a port authority was in effect a business corporation, not a governmental subdivision of the state, and was, therefore, liable for the payment of interest on its past due obligations.¹⁰⁷ This conforms to the general rule applicable to municipal corporations.

XI

TORTS

During the past biennium, as in other periods, the volume and variety of tort litigation has been heavy. For the most part, the cases and even the periodical literature deal with new applications of the distinction between governmental and proprietary functions, and of relief from the rigidity of notice of claim requirements. In a few additional cases, an effort was made to recover on the theory of nuisance where the function was established as governmental. Rather than belabor this review with annotations which merely cumulate trends and decisions which have been reported in past *Surveys*, we will concern ourselves this year with the limited number of decisions on questions where precedent has been light.

Public Authorities.—The Oregon court has renewed the inquiry whether a public authority is to be treated as a public utility or as a municipal corporation for purposes of tort liability. In the present case, the defendant was a housing authority in an action for damages to plaintiff's personal property which allegedly occurred when a fire started in a water heater in a tenant's apartment. The court followed the view of the earlier cases that the test is whether the public corporation is performing a governmental or proprietary function and not the form of its organization.¹⁰⁸ It was held that housing is a governmental function and that the authority was therefore not liable in tort.

Insurance.—In a case of first impression in Indiana, the supreme

¹⁰⁶ *Herzig v. Hunkin Conkey Construction Co.*, 101 N.E.2d 255 (Ohio App. 1941); *Losee v. Hettick*, 54 N.W.2d 353 (S.D. 1952); *Polk Township, Sullivan County v. Spencer*, 259 S.W.2d 804 (Mo. 1953).

¹⁰⁷ *Broward County Port Authority v. Arundel Corp.*, 206 F.2d 220 (5th Cir. 1953). A comprehensive annotation on the liability of a governmental unit for the payment of interest appears in Note, 24 A.L.R.2d 938 (1952).

¹⁰⁸ *Wickman v. Housing Authority of Portland*, 247 P.2d 630 (Ore. 1952).

court of that state has reviewed the authorities on the question whether a statute authorizing a municipality to procure public liability insurance to protect its officers, agents and employees against personal liability has the effect where the insurance is procured of waiving the municipality's immunity from liability in tort. The basic argument in favor of waiver is that the immunity rule developed because of a lack of a fund out of which a judgment could be paid. The Indiana court has declined to accept this reasoning and has held that the question is one for the legislature, since insurance and waiver of immunity are separate matters.¹⁰⁹ In Tennessee and Illinois, on the other hand, the carrying of liability insurance by a municipality has been construed as a waiver of immunity from liability in the exercise of a governmental function.¹¹⁰

Fire Loss Caused by Inadequate Water Supply.—The question of insurance has also arisen in an entirely different aspect as the result of renewed attempts by aggrieved property owners to overthrow the old rule that a municipality is not liable for fire loss caused by defective fire hydrants or an inadequate water supply. In New Jersey and California, the courts have agreed with the most recent decision in New York that *Moch Co. v. Rensselaer Water Co.* is still good law.¹¹¹ In the New Jersey case the result was particularly hard to take for the reason that the complaint alleged affirmative action upon the part of the water company to reduce the water pressure during the nighttime hours. In each case, the court was apparently persuaded that the risk of loss could more readily be distributed by the property owner seeking his own insurance rather than by imposing a liability upon the municipality or water utility which would be limitless in the case of a catastrophic fire.

Waiver of Sovereign Immunity.—A major question of the extent to which the New York waiver of immunity rule will be carried is suggested in a lower court case in which the city was held not liable for failure to provide adequate police protection for a young man who had recognized and pointed out to the police the notorious criminal Willie Sutton. Following this identification by Arnold Schuster, he was shot and killed by an unknown and unapprehended gunman. In a suit by the father of the deceased in his capacity as administrator,

¹⁰⁹ *Hummer v. School City of Hartford City*, 112 N.E.2d 891 (Ind. App. 1953).

¹¹⁰ *Bailey v. Knoxville*, 113 F. Supp. 3 (E.D. Tenn. 1953), 31 Chi-Kent L. Rev. 279 (1953); Comment, *Torts—Liability of an Insured School District*, [1953] U. of Ill. Law Forum 162.

¹¹¹ *Stang v. City of Mill Valley*, 38 Cal.2d 486, 240 P.2d 980 (1952); *Reimann v. Monmouth Consolidated Water Co.*, 9 N.J. 134, 87 A.2d 325 (1952). See also *Seitz v. City of Beacon*, 295 N.Y. 51, 64 N.E.2d 704 (1945), following *Moch Co. v. Rensselaer Water Co.*, 247 N.Y. 160, 159 N.E. 896 (1928), even though the governmental immunity doctrine had meanwhile been abrogated in New York.

the city's motion to dismiss the complaint was granted.¹¹² The theory of the decision is similar to the cases denying liability for fire loss where the hydrant or the water supply is defective. Thus far, the New York cases take the view that the waiver of sovereign immunity does not imply any lessening of the discretion of the municipal governing body to offer or withhold a particular service. The pre-existing duty which imposes liability in private law in cases of nonfeasance is what appears to be lacking in these public law cases.

In the Federal Tort Claims Act,¹¹³ such nonliability was expressly spelled out in the "discretionary function" exception to the waiver of sovereign immunity. An opportunity to define this discretionary function was presented to the United States Supreme Court in the Texas City explosion case. While the Court does not take the opportunity, it does state that "where there is room for policy judgment and decision there is discretion." Unfortunately, the Court goes on to refer more than once to "governmental function" as if it were the equivalent of discretionary function. The Court denied liability in the instant case, and it may well be that the handling of the dangerous explosive that was the cause of the damage could have had the same result under the New York rule, as an application of the defective plan defense which has long been available even where a proprietary function was involved.¹¹⁴

XII

ZONING AND PLANNING

In this field, as in torts, the volume of litigation has grown so great that space does not permit more than a very selective review of a few of the most important cases. Other developments may be found in the literature of the subject.¹¹⁵

Minimum Floor Area.—The most significant decision of the biennium, if not the decade, in zoning law was handed down by the New Jersey Supreme Court when it upheld the validity of a zoning ordinance establishing a minimum floor area in residence "A" districts. The township in which the ordinance was adopted was relatively large,

¹¹² *Schuster v. City of New York*, 121 N.Y.S.2d 735 (Sup. Ct. 1953).

¹¹³ 28 U.S.C. §§ 1346, 2671-8 (Supp. 1952).

¹¹⁴ *Dalehite v. United States*, 346 U.S. 15 (1953). For defective plan defense see Note, 90 A.L.R. 1502 (1934).

¹¹⁵ Yokley, *Zoning Law and Practice* (1953 ed.), Cavanaugh, *Zoning Restrictions on the Use of Land in Pennsylvania*, 13 U. of Pitt. L. Rev. 365 (1952); Freeman, *Has Zoning in Philadelphia been Anaesthetized?*, 26 Temp. L.Q. 22 (1952); German, *Airport Zoning*, 21 Kan. City L. Rev. 203 (1953); Reps, *The Zoning of Undeveloped Areas*, 3 Syracuse L. Rev. 292 (1952); Wright, *Zoning under the Florida Law*, 7 Miami L.Q. 324 (1953); Notes, *Zoning—The Non-Conforming Use and Spot Zoning*, 1 Buff. L. Rev. 286 (1952); *Zoning Laws and the Church*, 27 St. John's L. Rev. 93 (1952); Recent Cases, 7 Rutgers L. Rev. 416 (1953); 100 U. of Pa. L. Rev. 467 (1951).

and substantially undeveloped. Only 12 per cent of its total area had been built up. Evidence was introduced both for and against the reasonableness of the ordinance. In upholding the validity of the ordinance,¹¹⁶ the court approached the problem in a manner similar to its now-famous decision upholding the validity of an ordinance which excluded industry entirely from a purely residential community.¹¹⁷ The test of reasonableness is dependent upon the facts developed in each case, and these facts may take into consideration the surrounding area as well as the stage of development and general character of the community itself. While the court recognized some justification for the ordinance in the protection of the public health, it frankly declared that "without some such restrictions there is always the danger that after some homes have been erected giving a character to a neighborhood others might follow which would fail to live up to the standards thus voluntarily set . . . it is against this that the township has sought to safeguard itself within limits which seem to us to be altogether reasonable."¹¹⁸

The same court is consistent in upholding, in what appears to be a case of first impression, the reasonableness of a zoning ordinance which restricted construction of residences in a rural area to plots of not less than five acres.¹¹⁹ Here again, it was not so much the five-acre plot which was upheld as the reasonableness of that minimum size plot in a rural area where the evidence failed to show that the ordinance was unreasonable. Using the same test, the same court has even refused to set aside the application of a township zoning ordinance prohibiting more than one dwelling on a lot where it appeared that a given lot was in fact an undivided twenty-three-acre parcel.¹²⁰ It has been argued that minimum floor area and minimum lot size departs from the basic purpose of zoning to create an artificial standard for the minimum cost of a house that will be permitted within the district. While some such motive may often be present in the enactment of the ordinance, it cannot be denied that the restriction tends to protect values in the community as a whole, and the protection of such values has been recognized by the Supreme Court as one of the principal justifications for the exercise of the police power in zoning cases.

¹¹⁶ *Lionshead Lake, Inc. v. Wayne Township*, 10 N.J. 165, 89 A.2d 693 (1952). See also *Haar, Zoning for Minimum Standards: The Wayne Township Case*, 66 Harv. L. Rev. 1051 (1953); Recent Case, 21 Geo. Wash. L. Rev. 500 (1953).

¹¹⁷ *Duffcon Concrete Products, Inc. v. Borough of Creskill*, 1 N.J. 509, 64 A.2d 347 (1949).

¹¹⁸ 10 N.J. 165, 175, 89 A.2d 693, 698 (1952).

¹¹⁹ *Fischer v. Bedminster Township*, 11 N.J. 194, 93 A.2d 378 (1952).

¹²⁰ *Cobble Close Farm v. Board of Adjustment of Middletown*, 10 N.J. 442, 92 A.2d 4 (1952).

The period under review has also seen a large number of cases reflecting the growing hostility of the courts to nonconforming uses. On questions of variances and exceptions, similarly, the new emphasis on land-use regulation which has become apparent has also produced a large number of litigated cases. Space limitations do not permit a discussion of either of these two groups of cases.

XIII

CONCLUSION

As compared with private law, the rapidly changing political, economic and social conditions in which public law must operate are constantly producing a new environment and new or extended applications of established principles. This means that an annual or biennial review of legal developments must, of necessity, be burdened with a number of cases which are considered noteworthy only because they illustrate a new facet of government, a novel application of old principle, or an emergent trend in our dynamic society. It is apparent from this survey of the biennium 1952-1953 that these elements of vitality in the law of local government have continued to make their imprint upon the quality as well as the volume of case law, legislation and literature.

COPYRIGHT LAW

WALTER J. DERENBERG

SINCE the signing of the Universal Copyright Convention in September 1952,¹ there appears to have been increased activity in the copyright field both here and abroad. In the United States this is reflected by the formation in 1953 of the Copyright Society of the United States of America, with headquarters at the New York University Law Center, which was formed for the specific purposes of disseminating information and stimulating discussion of current problems relating to copyright. The *Bulletin* of the Society, a bimonthly publication, is intended to continue and enlarge upon the *Bibliographical Bulletin* which had previously been published by the Copyright Office itself and which had proved an invaluable tool to the copyright bar.

Almost simultaneously with the publication of the *Bulletin* of the Copyright Society, a group of distinguished French copyright experts announced the publication of a new trilingual publication entitled *Revue Internationale du Droit d'Auteur*, of which the first issue was published in October 1953.² Meanwhile, the Copyright Division of the United Nations Educational, Scientific and Cultural Organization has continued publication of its valuable *Bulletin*, and has just published a volume on the working documents of the Geneva Conference of 1952.³

In the field of legal education, too, copyright has found increased recognition and attention. Thus, the University of Chicago Law School has published the Proceedings of its Conference on the Arts, Publishing and the Law, which includes numerous valuable studies of copyright.⁴ The Graduate School of New York University for the

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¹ 1952 Annual Surv. Am. L. 618 et seq., 28 N.Y.U.L. Rev. 681 et seq. (1953).

² The first issue includes a number of leading articles on such timely and important questions as, for instance, the use of phonograph records by a broadcasting company without consent of author or record manufacturer; the treatment of cinematographic works in the Bern Convention as revised at Brussels; the limitations of the "fair use" doctrine with regard to microfilming of copyrighted material; copyright protection of works of the applied arts, and other copyright problems. The *Revue* will appear quarterly in French, but all major contributions are published in English and Spanish as well.

³ 6 UNESCO Copyright Bull. No. 1 (1953).

⁴ U. of Chi. Law School, Conf. Series No. 10 (May 5, 1952). Included are lecture by Finkelstein, Antitrust Laws and the Arts; Wright, The Film Industry: Its Sherman Act Past and Communications Act Future; Tyre, Protection of Ideas (Radio, Television, and Movies); Fisher, Privilege of Using Public and Private Manuscripts in the Protection of Art; Farmer, The Pressure Group Censors the Author.

first time offered an advanced seminar on literature and artistic property, in which both practical and legal aspects of song writing, book publishing, radio broadcasting, theatrical production and many other problems were discussed by outstanding experts in the field.⁵ The University of California held an institute on legal problems in the entertainment industry in November.⁶

As in 1952, the Federal Bar Association of New York, New Jersey and Connecticut sponsored a series of lectures on current copyright problems which has recently been published in book form under the title *1953 Copyright Problems Analyzed*.⁷ There have also been published numerous important new books⁸ and law review articles⁹ in the copyright field.

⁵ For a detailed description of this experiment see Derenberg, *The Place of Literary and Artistic Property in Legal Education*, 6 J. Legal Educ. 103 (1953).

⁶ See 1 Bull. Copyright Soc'y 57 (1953).

⁷ The papers include Fisher, *The Copyright Office and the Examination of Claims to Copyright*; Klein, *Protective Societies for Authors and Creators*; Solinger, *Idea-Piracy Claims—or Advertiser, Beware!*; Colton, *Contracts in the Entertainment and Literary Fields*; Wasserstrom, *Magazine, Newspaper and Syndication Problems*; Pilpel, *Tax Aspects of Copyright Property*; Derenberg, *Copyright No-Man's Land: Fringe Rights in Literary and Artistic Property*. The volume was arranged and edited by Theodore R. Kupferman.

⁸ In the international sphere, the most important new publication is the first volume of a legal encyclopedia entitled *World Copyright*, edited by H. L. Pinner, published in the English Language in Holland and covering thus far in alphabetical arrangement the letters A-Ci. The Encyclopedia itself is preceded by a survey of existent copyright legislation. The entire work is expected to be published in four volumes.

Of considerable current interest is the valuable study by Dr. W. Mak, *Rights Affecting the Manufacture and Use of Gramophone Records* (1952). This study by a Dutch expert, written in English, offers the most complete survey of the problems concerning protection of phonograph records which has yet been published. In the United States, attention may be called to the new text book by Harry P. Warner, entitled *The Law of Radio and Television Rights*, which is a continuation of the author's previous work entitled *Radio and Television Law*. It covers not only copyright but numerous aspects of trade-mark law and unfair competition as well.

Other publications in foreign languages are listed in 1 Bull. Copyright Soc'y No. 1, Items 25-30 (1953); Id. No. 2, Items 111-12 (1953); Id. No. 3, Items 191-98 (1953).

⁹ Among the outstanding recent studies are Bovard, *Copyright Protection in the Area of Scientific and Technical Works*, 38 Iowa L. Rev. 334 (1953); Breathitt, *Copyright Protection to Aliens and Stateless Persons*, 41 Ky. L.J. 301 (1953); Dublin, *Copyright Aspects of Sound Recordings*, 26 So. Calif. L. Rev. 139 (1953); Ilosvay, *Scientific Property*, 2 Am. J. Comp. L. 178 (1953); Katz, *Is Notice of Copyright Necessary in Works Published Abroad?—A Query and a Quandary*, [1953] Wash. U.L.Q. 55; Lerner, *Limitations Imposed on Television and Radio*, 39 A.B.A.J. 568 (1953); Smith, *The Copying of Literary Property in Library Collections*, 46 Law Library J. 197 (1953); Yankwich, *Thoughts of Copyright*, 28 Los Angeles Bar Bull. 117 (1953); Notes, *Deposit as Publication under Section 12 of the Copyright Code*, 8 N.Y.U. Intramural L. Rev. 202 (1953); 38 Iowa L. Rev. 334 (1953); *Piracy on Records*, 5 Stanford L. Rev. 433 (1953). Other leading articles relating to problems and decisions will be referred to separately as hereinafter discussed.

I

INTERNATIONAL DEVELOPMENTS

*The Universal Copyright Convention.*¹⁰—On June 10, 1953, there was issued Executive M,¹¹ in connection with the transmittal by the President of the United States of the Universal Copyright Convention to the Senate for the purpose of ratification. In the accompanying report of Secretary of State Dulles, the Senate is urged to ratify the convention in order to improve the unsatisfactory present international copyright relations of the United States. The Secretary of State said in his report:

This convention would provide a more adequate basis than presently exists for copyright protection abroad of United States books and periodicals, music, art, motion pictures and similar cultural and scientific creations. Although the United States is a party to certain multilateral agreements with Latin American countries, it has been unable to join the major international copyright convention of Bern, signed September 9, 1886, because that convention and its various revisions contain concepts which have been considered foreign to our concepts of copyright. We have therefore had to rely chiefly on a complex network of bilateral arrangements.

A number of other countries of the free world have likewise remained out of the Bern convention. Some of these countries are in fringe areas of the world in which propaganda from behind the Iron Curtain has its greatest impact and where programs for the exchange of cultural and educational materials are particularly important. A broad multilateral copyright coverage which includes those countries would serve as a stimulus to the flow of books and other educational media between them and other free countries. The Universal Copyright Convention has been carefully drafted to encourage such countries to become parties thereto.¹²

He further emphasized that our Government had engaged in close and continuous consultation with professional and business groups interested in copyright and that ratification of the convention by the United States

will not only significantly improve the protection accorded to United

¹⁰ Signed at Geneva on Sept. 6, 1952, by representatives of 36 countries. In addition to the literature listed in 1952 Annual Surv. Am. L. 618 n.3, 28 N.Y.U.L. Rev. 681 n.3 (1953), the following valuable articles have been published with regard to the Universal Convention: International Copyright Protection and the United States: The Impact of the UNESCO Universal Copyright Convention on Existing Law, 62 Yale L.J. 1067 (1953); Finkelstein, The Universal Copyright Convention, 2 Am. J. Comp. L. 198 (1953); Schulman, Another View of Article III of the Universal Copyright Convention, [1953] Wis. L. Rev. 297, an answer to the article by Warner, The UNESCO Universal Copyright Convention, [1952] Wis. L. Rev. 493. A list of all member countries of the Bern Copyright Convention as of Jan. 1, 1953, was published in Le Droit d'Auteur 9 (Jan. 1953).

¹¹ Sen. Doc., 83d Cong., 1st Sess. (1953) (Message from President to Senate on June 10, 1953).

¹² Id. at 2.

States private interests abroad, but will make a substantial contribution to our general relations with other countries of the free world. Early action by the United States with respect to ratification of the convention will enable the United States to play a leading part in helping to improve international relations in this important field.¹³

As will be pointed out hereinafter, it will, of course, be impossible for the United States to ratify the convention before having modified and amended our existing Copyright Act of 1909 in those respects in which its existing provisions would be incompatible with the covenants and international obligations of the new copyright convention. Such amendatory legislation has already been introduced in Congress.¹⁴

Other International Developments.—While the proposed ratification of the Universal Copyright Convention presently overshadows other international developments, it may not be amiss briefly to note some progress made in the ratification by foreign countries of earlier conventions. Thus, our copyright relations with Japan have been improved by the issuance of a proclamation by President Eisenhower.¹⁵ Under the new arrangement, American authors will be accorded exclusive copyright in translations of their works into Japanese for a minimum period of ten years. Under the previous treaty which was abrogated by the provisions of the Peace Treaty with Japan, Japanese nationals were free to translate United States works at any time without authorization and without payment of royalties. Under the new treaty, the reciprocal protection granted will also include rights in recordings of musical compositions.¹⁶ In July, Italy deposited its ratification of the Brussels Revision of the Bern Convention of June 26, 1948.¹⁷ Austria, too, has recently ratified the Brussels Revision of the Bern Convention.¹⁸ Argentina and Haiti have recently ratified the Washington Inter-American Copyright Convention of 1946.¹⁹

II

COPYRIGHT LAW IN THE UNITED STATES

A. Pending Legislation and Legislative Proposals

*H.R. 6616.*²⁰—Most important among legislative proposals now pending in Congress is, of course, H.R. 6616. This bill is not aimed

¹³ *Id.* at 4.

¹⁴ See H.R. 6616, 83d Cong., 1st Sess. (1953). See note 20 *infra*.

¹⁵ White House Press Release, Nov. 10, 1953. Proclamation 3037 is published at 18 Fed. Reg. 7263 (1953).

¹⁶ A list of all existing proclamations, treaties and conventions as of April 27, 1953, is available from the Office of the Legal Adviser, Department of State.

¹⁷ 66 *Le Droit d'Auteur* 73 (July 1953).

¹⁸ 66 *Le Droit d'Auteur* 113 (Oct. 1953).

¹⁹ Bull. from Manuel Canyes, Chief, Division of Law and Treaties, Pan American Union (Sept. 1953).

²⁰ 83d Cong., 1st Sess. (1953), introduced by Congressman Crumpacker, July 29,

at a radical revision of the Copyright Act of 1909 in its entirety but includes only such amendments thereof as appear to be the absolute minimum legislation necessary for the purpose of enabling the United States to ratify the convention. With that aim in mind, H.R. 6616 would amend the existing law in the following principal respects:

(a) Section 9 (the proclamation section) is amended so as to assure copyright protection to authors who are citizens of a country which has ratified the Universal Copyright Convention or whose works are first published in such countries. With regard to such authors or such works, it is proposed to eliminate the requirement of a separate presidential proclamation with regard to mechanical reproduction rights under Section 1(e) of the Act of 1909.²¹

(b) With regard to the persons and works referred to under (a), the obligatory-deposit requirements of the first section of Section 13 of the Act of 1909 would be eliminated.

(c) Of greater importance, with regard to such authors and works, the requirement of American manufacture, *viz.*, "binding and printing of books first published abroad in the English language," would be eliminated.²²

(d) With regard to the same authors and works, the important restrictions of Section 107, so far as they relate to the manufacturing requirements of Section 16, will be removed.

(e) With regard to such parties and works, the notice requirements of the Act of 1909 will be modified so as to hold sufficient the use of the symbol © accompanied by the name of the copyright

1953. A corresponding bill was introduced in the Senate, Sen. 2559, 83d Cong., 1st Sess. (1953), by Senator Langer on August 1, 1953. See also H.R. 6670, 83d Cong., 1st Sess. (1953), introduced by Congressman Reed on July 30, 1953, which is substantially identical to H.R. 6616.

²¹ The necessity for a separate proclamation was emphasized in *Portuondo v. Columbia Phonograph Co.*, 36 U.S.P.Q. 104 (S.D.N.Y. 1937) and *Todamerica Musica, Ltda. v. RCA*, 171 F.2d 369 (2d Cir. 1948).

²² For a separate proposal to eliminate the manufacturing clause see note 24 *infra*. As pointed out in 1952 Annual Surv. Am. L. 622-23, 28 N.Y.U.L. Rev. 685-86 (1953), attempts to eliminate the manufacturing clause in its entirety have failed thus far as a result of opposition on the part of the printing trades and the typographical unions. It appears to be high time, however, to renew efforts to eliminate this provision in its entirety which is foreign to the copyright system. In an editorial, N.Y. Times, Nov. 28, 1953, p. 14, col. 2, advocating ratification of the Universal Copyright Convention, it is rightly said: "But before it can be effective, there would have to be modification of the so-called 'manufacturing clause' in American law. This requires, in general, that books in the English language by foreign authors be printed here if they are to enjoy the copyright privilege. The removal of this restriction is opposed by some segments of the printing trade for fear that it would result in a flood of foreign-manufactured books in English. But the great classics—Shakespeare, for example—are in the public domain, not copyrighted; and yet the bulk of such books sold in the United States are printed here despite the fact that the 'manufacturing clause' gives them no protection."

proprietor and the year of first publication, provided the notice appears in such manner and location as to give reasonable notice of claim of copyright. In this way, the over-technical notice requirements of the Act of 1909 would no longer be applicable, at least to the works of citizens of a convention country or with regard to works of non-citizens which are first published in such country.

H.R. 6616 would also permit the use of the symbol ® with regard to works such as, for instance, books which under the present Act require the full copyright notice rather than permit this abbreviated form.

No hearings have yet been held or even scheduled with regard to this bill.²³

*H.R. 397 (the Celler bill).*²⁴—It was reported last year²⁵ that H.R. 4059, the Celler bill, seeking to abolish the manufacturing clause at least with regard to works published abroad in a foreign language by persons other than United States citizens, failed of passage and was not even reported despite the fact that it had the support of almost the entire bar. This was the result of opposition by representatives of the printing trades and the typographical unions. In January 1953, Congressman Celler reintroduced his bill as H.R. 397. This new proposal again, as a matter of compromise, retains the manufacturing provisions with regard to works of American citizens or alien authors domiciled in the United States.

*H.R. 2584.*²⁶—As will be pointed out hereafter, it has never been authoritatively decided whether, for purposes of renewal, the surviving spouse is in a joint class with the author's children or whether she would have priority. In order to clarify the renewal section in this respect, H.R. 2584 would provide that a surviving spouse would be in a class by herself and have priority over the author's children.²⁷

*The Juke-Box Bill.*²⁸—This bill was reintroduced as Sen. 1106 on Feb. 27, 1953, and further hearings held with regard thereto. As of the time of this writing, the most recent hearings, at which representatives of the juke-box industry testified, have not yet been printed.²⁹

²³ A separate bill, seeking revision of the existing notice requirements, was introduced by Congressman Keating as H.R. 6608, 83d Cong., 1st Sess. (1953).

²⁴ 83d Cong., 1st Sess. (1953).

²⁵ See 1952 Annual Surv. Am. L. 623, 28 N.Y.U.L. Rev. 686 (1953).

²⁶ 83d Cong., 1st Sess. (1953), introduced by Congressman Walter.

²⁷ See p. 375 *infra*.

²⁸ Replacing H.R. 5473, 82d Cong., 1st Sess. (1951). See 1952 Annual Surv. Am. L. 622 and n.13, 28 N.Y.U.L. Rev. 685 and n.13 (1953).

²⁹ Subsequent to the McCarran bill, Senator Dirksen introduced Sen. 1444, 83d Cong., 1st Sess. (1953), seeking complete elimination of the juke-box exemption. The new juke-box amendment is discussed in 65 The Billboard 16, 51 (March 7, 1953); 65 *id.* at 126 (June 27, 1953); 65 *id.* at 87 (June 20, 1953).

The McCarran bill, as a matter of compromise, does not seek complete elimination of the juke-box exemption but provides an exemption for a person

who himself owns, operates, services, and retains all receipts of a single such machine, located in an establishment in which he conducts a business other than that of providing entertainment, and to which no fee for admission is charged.

Such person shall not be liable for infringement if the rendition or reproduction of the music is "intended to be heard only by persons in such establishment."

*H.R. 6225.*⁸⁰—The purpose of this bill is to create a statute of limitations with respect to civil actions under the Copyright Act. Under this proposal, no civil action would be maintainable "unless the same is commenced within three years after the claim accrued."

*H.R. 2747.*⁸¹—This bill, which passed the House on May 19, 1953, provides that where the last day for making a deposit or application in the Copyright Office falls on a Saturday or a holiday, such action may be taken on the next succeeding business day.

*New York State Bill 347.*⁸²—Of considerable interest is a proposal to amend the New York Penal Law under which the unauthorized copying of phonograph records of broadcasts for sale or for use for gain or profit would become a criminal offense. This bill is a substitute for an identical Senate bill, Int. No. 188, which was passed by both houses on March 21, 1952, but vetoed by Governor Dewey on April 2, 1952.

B. Judicial Developments

*The Borderline Between Copyright and Design Patent: The Stein Cases.*⁸³—In 1951, the Court of Appeals for the Seventh Circuit had held that statuettes, which were registered as works of art but which in actual fact were intended for use as lamp bases, were protectible only under the design-patent statute and were not subject to copyright.⁸⁴ The court there took the position that it was immaterial

⁸⁰ 83d Cong., 1st Sess. (1953), introduced by Congressman Keating (by request).

⁸¹ 83d Cong., 1st Sess. (1953), introduced by Congressman Reed of Illinois.

⁸² Introduced by Assemblyman Wilson Jan. 13, 1953.

⁸³ Numerous articles and comments have been published recently with regard to this problem in general and the various Stein cases in particular. See Derenberg, Copyright No-Man's Land: Fringe Rights in Literary and Artistic Property, 1953 Copyright Problems Analyzed (Second of a Series, 1953), reprinted in 35 J. Pat. Off. Soc'y 627 (in three parts—Sept., Oct. & Nov. 1953); Pogue, Borderland—Where Copyright and Design Patent Meet, 52 Mich. L. Rev. 33 (1953) (prize-winning essay in the Nathan Burkan Memorial Competition); Notes, 21 Geo. Wash. L. Rev. 353 (1953); 66 Harv. L. Rev. 877 (1953); 37 Minn. L. Rev. 212 (1953). See also 1951 Annual Surv. Am. L. 720; 1952 Annual Survey Am. L. 631, 28 N.Y.U.L. Rev. 694 (1953).

⁸⁴ *Stein v. Expert Lamp Co.*, 188 F.2d 611 (7th Cir. 1951); see 1951 Annual Surv. Am. L. 720.

whether the statuettes actually deposited with the Copyright Office showed sockets and mounting stubs indicating their proposed commercial use. The Supreme Court at that time denied certiorari.³⁵ This proved to be the mere beginning of an entire series of subsequent litigation in which the Copyright Office and the Government itself participated and which is now awaiting final decision by the United States Supreme Court. Following the *Expert Lamp* case in the seventh circuit, a California district court, in *Stein v. Rosenthal*,³⁶ upheld the copyright, contrary to the *Expert Lamp* case, on the ground that the characteristic of the statuette as a work of art was not changed by the artist's original or subsequent intent commercially to exploit his work. The district court's opinion was recently affirmed by the Court of Appeals for the Ninth Circuit. The appellate court said:

We do not read the design patent law as stronger or prevailing over the copyright law, hence we are of the opinion that when the creator of the statuettes was granted copyright privileges as to them, such privileges became rights and cannot be affected by a speculation that possibly the objects could have been patented as designs. And such rights cannot be affected by the gratuitous use of the creations by strangers for ornamental supports for a household utility—in this case a lamp. The theory that the use of a copyrighted work of art loses its status as a work of art if and when it is put to a functional use has no basis in the wording of the copyright laws and there is nothing in the design-patent laws which excludes a work of art from the operation of the copyright laws.³⁷

In the meantime, a district court in Detroit,³⁸ in following the *Expert Lamp* case, held the statuette to be uncopyrightable and refused all relief to the plaintiff. About the same time the case of *Stein v. Mazer* was decided by a district judge in the fourth circuit,³⁹ who again followed the *Expert Lamp* case but was reversed by the Court of Appeals for the Fourth Circuit,⁴⁰ which expressly refused to follow that case and upheld the plaintiff's copyright as valid. The United States Supreme Court, in view of this irreconcilable conflict among the decisions of the various appellate courts, recently granted certiorari and the case was argued early in December. In the *Mazer* case, the court was apparently greatly influenced by a deposition taken on behalf of the plaintiff from the Register of Copyrights, who indicated that under the revised copyright rules, the Office registers only the artistic aspects of such works of the applied arts "insofar as their

³⁵ 342 U.S. 829 (1951).

³⁶ 103 F. Supp. 227 (S.D. Cal. 1952), aff'd, 205 F.2d 633 (9th Cir. 1953).

³⁷ 205 F.2d 633, 635 (9th Cir. 1953).

³⁸ *Stein v. Benaderet*, 109 F. Supp. 364 (E.D. Mich. 1952). An appeal from this decision is still pending in the sixth circuit.

³⁹ 111 F. Supp. 359 (D. Md. 1953).

⁴⁰ 204 F.2d 472 (4th Cir.), cert. granted, 74 Sup. Ct. 49 (1953).

form but not their mechanical or utilitarian aspects are concerned." The Solicitor General's Office was requested by the Supreme Court to file a brief on behalf of the Government. The final outcome of the *Stein* litigation will be particularly significant in view of the series of holdings to the effect that an unsuccessful applicant for copyright or for a design patent is precluded, once he has elected to proceed under one of these acts, from subsequently seeking protection under the other act under which he might originally have qualified. In effect he would "fall between two stools."⁴¹ It was so held in the early leading case of *In re Blood*⁴² and, more recently, by the Court of Customs and Patent Appeals in the case of the "shadow blend roof design."⁴³ Should the Supreme Court rule that the lamp bases were not subject to copyright, the result may well be that hundreds, if not thousands, of objects of the applied arts which have been registered with the Copyright Office as "works of art" since the 1947 amendment to its rules, may fall into the public domain since they have become ineligible for design-patent protection even if such protection might have been obtainable before the election to seek copyright protection was made by the author.

New Problems Concerning Copyright Renewal.—In *Marks Music Corp. v. Borst Music Pub. Co.*⁴⁴ the novel question was presented whether a widow loses her status as such under the renewal provision of the Copyright Act as the result of remarriage. The question was answered in the negative.

In *Ballentine v. DeSylva*⁴⁵ the question was squarely presented whether a surviving spouse excludes the author's children for purposes of securing renewal of copyright. In that case, the question was answered in the affirmative and an action brought by an illegitimate son of a deceased author was dismissed on the ground that the surviving spouse had priority over him. In other words, the court's decision enunciated the rule which H.R. 2584⁴⁶ seeks to establish by legislation.

⁴¹ See in this regard *Derenberg, Copyright No-Man's Land: Fringe Rights in Literary and Artistic Property*, 35 J. Pat. Off. Soc'y 690 (1953).

⁴² 23 F.2d 772 (D.C. Cir. 1927). See also *De Jonge & Co. v. Breuker & Kessler Co.*, where the court said: "Such a work may be used in both the fine and useful arts; but it can have protection in only one of these classes. The author or owner is driven to his election and must stand by his choice." 182 Fed. 150, 152 (C.C.E.D. Pa. 1910).

⁴³ Ex parte Appeal No. 28,818, Feb. 29, 1952, discussed at 34 J. Pat. Off. Soc'y 463 (1952). See also the Court of Claims decision in *Fulmer v. United States*, 103 F. Supp. 1021 (1952), in which the plaintiff had copyrighted a design showing a camouflaged parachute. His suit against the Government for copyright infringement was dismissed on the ground that the use of the design by the Government did not constitute copyright infringement but that the plaintiff might have sought design-patent protection. This aspect of the problem is also thoroughly discussed in *Pogue*, supra note 33, at 51.

⁴⁴ 110 F. Supp. 913 (D.N.J. 1953).

⁴⁵ S.D. Cal., April 29, 1953.

⁴⁶ See note 26 supra.

The Problem of Joint Authorship Revisited.—An important new development concerning the complex problem of joint authorship recently occurred in *Shapiro Bernstein & Co. v. Vogel Music Co.*⁴⁷ It may be recalled that the Court of Appeals for the Second Circuit had previously held in a case involving the same parties, but a different musical work, that for purposes of renewal two persons may be considered joint authors even though they never met or never heard of each other and did not work in concert. This has been the law ever since Judge Hand said in the earlier case of *Marks v. Vogel*,⁴⁸ in connection with the relationship between the composer of the music and the writer of the lyrics of a song, that "it is enough that they meant their contributions to be complementary in the sense that they are to be embodied in a single work to be performed as such."⁴⁹ Thus, having been twice successful before, the defendant was apparently confident of defeating for the third time a claim of copyright infringement in a case in which it relied upon an assignment from a lyric writer who was found by the court not to have been in the employ of the music publisher but to have been an independent contractor. In this case, however, Judge Leibell held that, contrary to the first *Shapiro* case, the lyric writer could not be considered a joint author and that the musical work involved was a composite work rather than a joint work, with the result that the renewal obtained for the music did not inure to the benefit of the defendant. The rule of the first *Shapiro* case was held to be limited to situations in which the composer of the music had at least originally intended or was aware of the fact that his music might become part of a song. Where, as in this case, the composer never had any intention of having lyrics added to his music but had written the music as an instrumental piece for the piano and orchestra, the fiction of joint authorship could not, in Judge Leibell's opinion, be carried to the extent of finding a joint work. He thus concluded:

Under the principles laid down in the decided cases I am satisfied that the song "12th Street Rag" was a "composite work", not a joint work. Sumner was not a joint author of the "song". All that Sumner could assign to Vogel was Sumner's renewal interest in the lyric. Neither Sumner nor Vogel had any right to publish the music of the "12th Street Rag" in connection with the Sumner lyric.⁵⁰

For the same reason, the court held that the publisher's assignment to plaintiff of its rights in the song was a nullity insofar as it involved

⁴⁷ 115 F.Supp. 754 (S.D.N.Y. 1953).

⁴⁸ 140 F.2d 266, 268, 270 (2d Cir. 1944).

⁴⁹ *Id.* at 267.

⁵⁰ *Shapiro Bernstein & Co. v. Vogel Music Co.*, 115 F.Supp. 754, 759 (S.D.N.Y. 1953).

any period beyond the expiration of the original copyright term, since the publisher had no renewal interest in the lyric. As a result, plaintiff's first cause of action for infringement of the renewal copyright in the instrumental music was sustained while its second cause of action, based on infringement of the renewal right in the song, including the lyrics, was dismissed, as was defendant's counterclaim for a declaratory judgment to the effect that it was a co-owner of an undivided 50 per cent in the song.

What Constitutes a Composite Work?—In last year's *Survey*, reference was made to the case of *Markham v. Borden*,⁵¹ involving alleged infringement of thirty-nine different catalogues which—the court found—were in fact only republications and reissues of the original catalogue. The lower court found only a few instances of actual copying which it held were too insignificant and unsubstantial to permit any recovery or even the issuance of an injunction. Consequently, the district court had dismissed in its entirety plaintiff's action charging some 800 instances of infringement. The Court of Appeals for the First Circuit, however, recently reversed the lower court, entering judgment for the plaintiff, and remanded the case for the purpose of assessing damages.⁵² The appellate court held that the test of "material and substantial infringement" had no application to works such as catalogues which were entitled to the benefit of Section 3 of the Copyright Act, which extends protection to all the component parts of a composite work. Plaintiff's catalogues were held to be composite works under Section 3 rather than "compilations" covered by Section 7. Defendant's allegation that Section 3, the component part section, contemplated only works consisting of a number of separately authorized, distinguishable and individually copyrightable component parts, was rejected on the ground that the concept of "composite work" could not be deemed limited to works whose parts were separately authored. The court said:

An original achievement in the publication of a trade catalog, such as in this case the authorship of a comprehensive library, concisely describing the function and utility of refrigeration supplies, would have to be protected as to all component parts in order for the protection to be meaningful. Otherwise, if only the whole catalog were protected, and not each of its parts, then various wholesalers could select just a few items from the copyrighted catalog, according to each wholesaler's particular inventory, or according to each wholesaler's particular preference for certain illustrations or descriptions. If such a selective pirating were

⁵¹ 95 U.S.P.Q. 313 (D. Mass. 1952); see 1952 Annual Surv. Am. L. 625, 28 N.Y.U.L. Rev. 681 (1953).

⁵² 98 U.S.P.Q. 346 (1st Cir. 1953).

allowed by applying the "material and substantial" test to the whole catalog rather than to each of its parts, then the copyright on the catalog would seem to have very little value. Such a result would be inconsistent with the policy of protecting original achievements in this area and the statutory language does not indicate that such a result was intended.⁵³

*The California Rule on Protection of Ideas Abolished.*⁵⁴—Until recently, the State of California was the only state which, in Section 980 of its Civil Code, extended statutory protection to the author of "any product of the mind," whether it may be an invention or a composition in letters or art or a design, as well as to a representation or expression thereof. However, in 1947, this statutory provision was changed by eliminating the language "any product of the mind" and providing instead that protection should be available only for the "representation or expression" of a composition. It has now been held by the Supreme Court of California (one justice dissenting) that, as a result of this statutory change, California is now committed to the traditional theory of protectible property under common-law copyright and that, therefore, the broader idea-protection which had been applied in the well-known leading cases of *Stanley v. CBS*⁵⁵ and *Golding v. RKO Pictures, Inc.*⁵⁶ was no longer the law. It was so held in a series of three simultaneously decided cases, all of which were decided "en banc."⁵⁷ In one case, *Weitzenkorn v. Lesser*, plaintiff alleged three causes of action for unlawful use of her literary property by the defendant, based on a theory of express contract, implied contract and a tort theory of misappropriation, respectively. The lower court sustained demurrers with regard to all three of these causes of action but was reversed by the supreme court with regard to the first two. Plaintiff alleged, inter alia, that the lower court had erred in holding Section 426 of the California Code of Civil Procedure applicable to any cause of action which did not actually involve copyright infringement but was based on a theory of express or implied contract.⁵⁸ However, the defendant's argument that Section 426 was

⁵³ Id. at 348.

⁵⁴ The California rule is discussed by Solinger, *supra* note 7. See also with regard to idea protection in general, Note, Property Rights in an Idea and the Requirement of Concreteness, 33 B.U.L. Rev. 396 (1953); Note, Legal Protection of Ideas, 19 Brooklyn L. Rev. 97 (1952); Decisions, 15 Ga. B.J. 504 (1953); 41 Geo. L.J. 424 (1953); 27 St. John's L. Rev. 364 (1953); 21 Geo. Wash. L. Rev. 654 (1953). The last three decisions deal with the recent case of *Belt v. Hamilton Nat. Bank*, 108 F. Supp. 689 (D.D.C. 1952).

⁵⁵ 35 Cal.2d 653, 221 P.2d 73 (1950).

⁵⁶ 35 Cal.2d 690, 221 P.2d 95 (1950).

⁵⁷ *Burtis v. Universal Pictures Co.*, 256 P.2d 933 (Cal. 1953); *Weitzenkorn v. Lesser*, 256 P.2d 947 (Cal. 1953); *Kurlan v. CBS*, 256 P.2d 962 (Cal. 1953).

⁵⁸ Cal. Code Civ. Proc. § 426(3) (1949), reads in part: "If the demand be for relief on account of the alleged infringement of the plaintiff's rights in and to a literary

intended to create a statutory method for determining upon demurrer whether a complaint either for plagiarism or based on a contract theory states a cause of action was upheld by the supreme court. Accordingly, the lower court was held correct in making the motion picture involved a part of the complaint affecting all three alleged causes of action. The court further decided that the issues concerning originality, similarity and copying were questions of law determinable upon demurrer, saying with regard to the question of originality:

Accordingly, if the production attached to Weitzenkorn's complaint shows no evidence of originality, she has no protectible property therein and there is no question to submit to the jury.⁵⁰

Contrary to the *Stanley* and *Golding* cases, it was now held that only "the development of both characterizations and adventures," and not the "basic dramatic core" as such, was entitled to common-law protection. With regard to the issue of similarity, the court broadly stated that where the two productions were both before the court, it could be determined upon demurrer as a question of law that there was no similarity between the two works involved. Only where from a comparison of the productions, similarity might reasonably be found should that issue, in the court's opinion, be submitted to the jury.

However, despite all this, the court concluded that the two causes of action based on a contract theory should not have been dismissed on demurrer. With regard to these two allegations the question of originality or protectibility under the statute was legally insignificant since it was conceivable, although not likely, that the defendants may have offered compensation on a contractual basis regardless of the novelty, originality or merit of the idea submitted. Thus, the plaintiff should at least have an opportunity to introduce evidence tending to show an express or implied agreement to pay for her production "regardless of its protectibility and no matter how slight or commonplace the portion which they used." Justice Carter, in his dissenting opinion, took issue with the majority's view that the 1947 amendment had eliminated the protection formerly given to "any product of the mind."

The same result was reached in the second of the three cases, *Kurlan v. CBS*, in which a demurrer had also been sustained with regard to the two causes of action based on express or implied contract. In this case, however, the cause of action arose before the statute was amended.

In the third case, *Burtis v. Universal Pictures Co.*, it was held

artistic or intellectual production, there must be attached to the complaint a copy of the production as to which the infringement is claimed and a copy of the alleged infringing production."

⁵⁰ Weitzenkorn v. Lesser, 256 P.2d 947, 954 (Cal. 1953).

—over the strong dissent of Justice Carter—that the question of similarity between the infringed and the infringing work was a question of law, reviewable by the court after a jury had found in favor of the plaintiff. Said the Supreme Court of California:

The appellate court may determine whether the evidence of originality, protectibility, access, similarity and copying is sufficient to support the verdict. . . . If there is sufficient evidence to establish these elements of the tort, the verdict of the jury upon the questions of fact raised by the evidence will not be disturbed. However, in the final analysis, the sufficiency of the evidence is a question of law.⁶⁰

This case, too, had been tried on the basis of the old Section 980 but, although conceding that the "basic dramatic core" was protectible under the former wording of the statute, it was held in the present case that there had not been sufficient evidence to support the jury's verdict of finding substantial similarity and copying.

It would thus seem that, as a result of these three cases, the common law of California now follows the same rule which always has been applied by the equity courts in other jurisdictions with regard to protectibility of ideas or, as the California statute used to call it, "products of the mind."⁶¹

Copyright and the Income Tax Laws: The Case of the Truman Memoirs.—The present Internal Revenue Code excludes from the classification of capital assets any gains derived from "a copyright, a literary, musical, or artistic composition, or similar property." This section does not distinguish between professional and nonprofessional authors. It has, however, now been ruled by the Internal Revenue Bureau in a case known to involve former President Truman's memoirs,⁶² that a sale of a manuscript by a taxpayer who is not a professional author may come within the benefits of that provision of the Code which is applicable to casual sales of personal property on the installment basis, provided all the requirements of Section 44(b) of the Code are met. As a result, the gain resulting from an executory contract for publication of a book may be spread over the entire period of payment.

*Song Writers' Suit for \$150,000,000 Damages.*⁶³—This survey

⁶⁰ *Burtis v. Universal Pictures Co.*, 256 P.2d 933, 939 (Cal. 1953).

⁶¹ For another recent California case involving the same problem see *Sutton v. Walt Disney Productions*, 258 P.2d 519 (Cal. App. 1953), and, most recently, *Taylor v. Metro-Goldwyn-Mayer Studios*, 115 F. Supp. 156 (S.D. Cal. 1953). Here a federal district court denied the defendant's motion for summary judgment in a suit based on alleged misappropriation of a novel and unique advertising idea on the ground that the question of originality and uniqueness as well as the question of copying could not be decided on motion for summary judgment but only after trial of the issues. The ruling is discussed in 1 Bull. Copyright Soc'y 6 et seq. (1953).

⁶² N.Y. Times, Nov. 8, 1953, § 3, p. 1, col. 5.

would not be complete without at least a brief mention of the spectacular civil antitrust action just instituted by a number of well-known song writers, as a class, against all major radio broadcasting companies, and particularly, Broadcast Music, Inc. (BMI), charging the defendants with conspiracy and monopolization in connection with the recording of copyrighted music and its exploitation through public performances for profit. The plaintiffs seek not only money damages but also dissolution of the National Association of Radio and Television Broadcasters, as well as complete divestiture with regard to control and membership in the defendant, Broadcast Music, Inc. While the American Society of Composers, Authors and Publishers (ASCAP) is not a party to this action, the actual core of the complaint is, of course, a charge that through BMI the record manufacturers and broadcasters discriminate against members of ASCAP and seek unlawfully to build up and develop their own organization to the detriment of those song writers who are members of the American Society rather than of BMI. As of the time of this writing, no answer has been filed by the defendants.

⁶⁸ Schwartz v. Broadcast Music, Inc., S.D.N.Y., complaint served Nov. 9, 1953.

PATENT LAW

DAVID S. KANE

DURING the past year there have been no patent decisions by the Supreme Court and those that have been handed down by the courts of appeals of the several circuits have not contributed to the growth of judicial interpretation of existing law. The new Patent Act, known as the Patent Act of 1952, has had its first trial by fire and although such decisions as have been handed down to date under the new Act cannot be considered as particularly definitive, they are, nevertheless, interesting because they indicate a trend. Set forth below are those decisions pertaining to the new Act that are felt to be of significance.

The Definition of Invention.—The Patent Act of 1952¹ provides:

A patent may not be obtained . . . if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. . . .²

In a few of the circuits this section has been interpreted as being nothing more than a codification of the law, not a revision which would give greater strength to patents. The Court of Appeals for the Sixth Circuit considered the "obvious" requirement of this section and stated:

We fail to see the basis upon which the conclusion can be drawn, as argued by appellee, that the Patent Act of 1952 provides a new test of patentability, insofar as the issue of patentability in the instant case is concerned; and the legislative history appears to afford no support to appellee's view that a new test as to "obviousness" has been embodied in the Act. . . .

* * *

. . . it would appear that the new Act has done no more in this respect than to adopt the test of so-called "obviousness" which has, in the past, been enunciated by the courts, and that it did not provide a new test differing from that which has been generally followed in the adjudication of patent cases.³

Comparable conclusions also have been reached in the Courts of Appeals for the Third Circuit⁴ and for the District of Columbia.⁵

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¹ 66 Stat. 792 (1952), 35 U.S.C.A. § 1 et seq. (Supp. 1953).

² 66 Stat. 798 (1952), 35 U.S.C.A. § 103 (Supp. 1953).

³ General Motors Corp. v. Estate Stove Co., 203 F.2d 912, 915 (6th Cir.), cert. denied, 74 Sup. Ct. 37 (1953).

⁴ Stanley Works v. Rockwell Mfg. Co., 203 F.2d 846 (3d Cir.), cert. denied, 74 Sup. Ct. 30 (1953).

⁵ New Wrinkle, Inc. v. Watson, 206 F.2d 421 (D.C. Cir.), cert. denied, 74 Sup. Ct.

The third and ninth circuits have held that Congress did not attempt to define invention in the Act and that, accordingly, prior judicial decisions must serve that purpose.⁶

Other decisions state that the new Act neither raised nor lowered the standard of invention;⁷ that none of the classical "norms" of invention have been changed;⁸ that the Act "has not revolutionized American patent law";⁹ and that this section of the Act "merely stabilized" well-recognized case law.¹⁰

The section of the Patent Act of 1952 under discussion concludes by stating:

Patentability shall not be negated by the manner in which the invention was made.¹¹

This sentence was added so that it would be "immaterial whether [invention] resulted from long toil and experimentation or from a flash of genius,"¹² and has been held by one court to revise substantive patent law:

This wording officially not only rejects the "flash of genius" test . . . but it goes farther. Today one may have a patent if he just "stumbled" upon his invention or it might even have been the result of accident. . . .¹³

Two other courts have noted this statutory language without deciding whether or not it effected any change.¹⁴

Attorneys Fees.—Under the prior patent law a court could, in its discretion, award reasonable attorneys fees to the prevailing party in a patent case;¹⁵ this provision was the subject of numerous interpretations.¹⁶ The new Patent Act states:

35 (1953); see also *Joseph Bancroft & Sons Co. v. Brewster Finishing Co.*, 113 F. Supp. 714 (D.N.J. 1953); *Lyons v. Construction Specialties, Inc.*, 112 F. Supp. 317 (D.N.J. 1953).

⁶ *United Mattress Machinery Co. v. Handy Button Machine Co.*, 207 F.2d 1 (3d Cir. 1953); *Kwikset Locks, Inc. v. Hillgren*, 97 U.S.P.Q. 206 (9th Cir. 1953).

⁷ *Application of O'Keefe*, 202 F.2d 767 (C.C.P.A. 1953).

⁸ *Thys Co. v. Oeste*, 111 F. Supp. 665, 673 (N.D. Cal. 1953).

⁹ *E. Clemens Horst Co. v. Oeste*, 114 F. Supp. 408 (N.D. Cal. 1953).

¹⁰ *Gagnier Fibre Products Co. v. Fourslides, Inc.*, 112 F. Supp. 926, 929 (E.D. Mich. 1953); see also Goodman, *The Effect of Section 103 of the Patent Act of 1952 upon the Patent Laws*, 35 J. Pat. Off. Soc'y 233 (1953).

¹¹ 66 Stat. 798 (1952), 35 U.S.C.A. § 103 (Supp. 1953).

¹² Sen. Rep. No. 1979, 82d Cong., 2d Sess. 18 (1952).

¹³ *Gagnier Fibre Products Co. v. Fourslides, Inc.*, 112 F. Supp. 926, 929 (E.D. Mich. 1953).

¹⁴ *United Mattress Machinery Co. v. Handy Button Machine Co.*, 207 F.2d 1, 4 (3d Cir. 1953); *Application of O'Keefe*, 202 F.2d 767, 771 (C.C.P.A. 1953).

¹⁵ 60 Stat. 778, 35 U.S.C. § 70 (1946).

¹⁶ *Laufenberg, Inc. v. Goldblatt Bros., Inc.*, 187 F.2d 823 (7th Cir. 1951); *Wilson v. Seng Co.*, 194 F.2d 399 (7th Cir. 1952).

The court in exceptional cases may award reasonable attorney fees to the prevailing party.¹⁷

It has been interpreted in one instance:

The rule under the 1946 act was that attorney's fees should not be allowed as a matter of course but that there had to be some extraordinary showing to invoke the court's discretion. . . . This rule was codified in the recent Patent Act of July 19, 1952. . . .¹⁸

Thus, it can be seen that, though some initial interpretations of the Patent Act of 1952 have been made, the Act, as with any new legislation, will be subject to much clarification in the next few years.

¹⁷ 66 Stat. 813 (1952), 35 U.S.C.A. § 285 (Supp. 1953).

¹⁸ *Texas Co. v. Globe Oil & Refining Co.*, 114 F. Supp. 144, 146-47 (N.D. Ill. 1953).

PART THREE

Commercial Law, Torts and Family Law

CONTRACTS

FRANCIS J. PUTMAN

FOR THE last two years the *Survey* article on Contracts placed major emphasis on government contracts. This year the emphasis has shifted to private contracts with incidental discussion of cases involving governmental contracts. Mention should be made of several articles and one note on the latter subject: Braucher, *The Renegotiation Act of 1951*;¹ Wienshienk and Feldman, *The Current Challenge of Military Contract Termination*;² Braucher and Hardee, *Cost-Reimbursement Contracts with the United States*;³ and *The Assignment of Government Contracts as Collateral*.⁴

Leading articles and extensive notes in the field of private contracts have, for the most part, selected phases of the performance of contracts as the topic for consideration. The published materials are: *Prevention and Co-operation in the Law of Contract*;⁵ *The Contractual Concept of Condition*;⁶ *The Fetish of Impossibility in the Law of Contracts*; *Wages During Temporary Disability*;⁷ and *Selected Problems in Contract Liability*.⁸

Irrevocable Offers.—The incident of irrevocability does not attach to an offer merely because the offeror has manifested willingness to suspend his power of revocation. In the absence of statute, a promise by an offeror not to revoke or countermand his offer is legally inoperative unless the promise is supported by consideration, is under seal or the circumstances bring into effect the doctrine of promissory estoppel. A statutory attribute of irrevocability is quite often appended, by state statute or regulation, to bids made in connection with

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¹ 66 Harv. L. Rev. 270 (1952).

² 66 Harv. L. Rev. 47 (1952).

³ 5 Stan. L. Rev. 4 (1952).

⁴ Note, 101 U. of Pa. L. Rev. 106 (1952).

⁵ Stoljar, 31 Can. B. Rev. 231 (1953).

⁶ Stoljar, 69 L.Q. Rev. 485 (1953).

⁷ Note, 53 Col. L. Rev. 94 (1953).

⁸ Schwarzer, 5 Stan. L. Rev. 30 (1952).

⁹ Lake, 32 Neb. L. Rev. 1 (1952).

municipal contracts, a fact well known to those accustomed to bidding on such contracts. It is now clear that persons submitting bids to the Federal Government should realize the possibility that they may be deprived of the power to revoke their bids. A decision of the United States Court of Claims¹⁰ has denied the power of revocation to a bidder who responded to an invitation for bids which incorporated by reference regulations precluding the withdrawal of a bid after the time fixed for the opening of bids. The effect of the regulations in preventing the perpetration of frauds against the United States by bidders was the principal factor influencing the court's decision. The court recognized that mistake, unreasonable delay in making the award, and similar matters would warrant judicial relief from the inhibition on revocation but it could find no evidence that the bidder's attempted revocation was based upon any such matter.

Option: Time of Essence.—In the area of the option contract the courts have manifested consistent adherence to the attitude that time is of the essence. The option holder, ordinarily, has no substantial basis for complaint against this attitude. He has received everything for which he bargained as the exchange for his consideration when he is allowed the specified time for fulfillment of the terms of the option. Further, when he asks judicial extension of the option period he is requesting the court to continue an unbalanced situation, a situation in which the option giver is restricted while the option holder has complete freedom of action. *Dargan v. Page*,¹¹ a South Carolina case, is illustrative of the reluctance of courts to grant judicial extension of the option period by excusing delay in the exercise of the option. The assignee of a thirty-day option to purchase land, which was to be exercised by demand for a deed or by payment of the purchase money, claimed that absence of the option giver on the last two days of the option period justified late exercise of the option. The option period expired on Saturday of the Labor Day week end. The attorney for the assignee made fruitless efforts to locate the option giver on Friday and on Saturday morning. The option giver, who had been away from town on a legitimate errand, returned on Saturday afternoon, but after the attorney had left town for the week end. The court was not sympathetic since it felt that there was no time during the thirty-day period when the assignee or his attorney could not have complied with the terms of the option by a written communication mailed or delivered to the option giver or left at his home.

¹⁰ *Refining Associates, Inc. v. United States*, 109 F. Supp. 259 (Ct. Cl. 1953), 66 Harv. L. Rev. 1312.

¹¹ 222 S.C. 513, 73 S.E.2d 705 (1952). See also *Unatin 7-Up Co. v. Solomon*, 350 Pa. 632, 39 A.2d 835 (1944).

Third Party Beneficiary.—A present-day court is not confounded when presented with the "anomaly" of suit by a stranger to a contract. The requirement of privity of contract, with its confining effect, is no longer operative in most jurisdictions. The main problem a court must solve is whether the particular stranger is a recognized or incidental beneficiary. Not all strangers are recognized as proper parties-plaintiff since it is obvious that a contract promisor should not be exposed to suit by every person who is in a position to show that performance of the contract would have resulted in some benefit to him. The historical categories of creditor beneficiary and donee beneficiary are helpful and a person who can bring himself under one or the other of those categories is placed under the general classification of recognized beneficiary. If the person benefited by the contract does not fit the traditional categories he may still establish a right to sue on the contract if he can show that the contracting parties intended that he should receive a direct benefit, or that he should have rights under the contract, or that the duty of the promisor should run to him;¹² if he cannot show such intent he will be considered an incidental beneficiary and without rights. If classification as a recognized beneficiary depended on ingenuity alone, the plaintiff in a recent case¹³ would have been so classified. Plaintiff, charterer of a ship, contracted with a subcharterer who contracted with a stevedoring company which was a member of an employers' association possessing a contract with a union of longshoremen. The contract between the union and the employers' association prohibited work stoppage pending arbitration of disputes. The employees of the stevedoring company stopped work in violation of the contract. Plaintiff brought suit against the union to recover damages alleged to be caused by the delay in unloading the ship resulting from the work stoppage. The court classified plaintiff as an incidental beneficiary, pointing out that it was three steps away from the contracting party. Plaintiff was too remote from the contract to assert rights under it for "neither in contract nor in tort have duties been extended very far beyond the immediate parties to the facts out of which a cause of action is said to arise."

In another case¹⁴ the court insulated a promisor from liability to a beneficiary by a tenuous finding of want of consideration for the promise. The court seemed inclined to classify the beneficiary as an

¹² Sometimes the traditional category of donee beneficiary is enlarged so as to encompass all recognized beneficiaries who are not subject to classification as creditor beneficiaries. See Restatement, Contracts § 133 (1932).

¹³ *Isbrandtsen Co. v. Local 1291 of Int'l Longshoremen's Ass'n*, 204 F.2d 495 (3d Cir. 1953).

¹⁴ *United States v. Inorganics, Inc.*, 109 F. Supp. 576 (E.D. Tenn. 1952), 22 Tenn. L. Rev. 1060 (1953).

incidental beneficiary but preferred to justify its decision on the consideration basis. A grantor traced title to land to a corporation which was subject to liability for income taxes, although the taxes were not a lien upon the land. On conveying the property the grantor inserted in the deed a provision by which the grantee assumed the unpaid income taxes of the corporation. The Government, having been unsuccessful in collecting the taxes from the corporation, sued the grantee on the theory that the Government was a third party beneficiary of the promise made to the grantor. The court negated the status of the Government as creditor beneficiary since the grantor was under no personal liability to pay the corporation's taxes. The court decided that the assumption clause in the deed was grounded either upon mistaken belief or upon charitable impulse, and, charity being emphatically disavowed, described the Government as a "donee beneficiary of a promise devoid of beneficent impulse." Unfortunately for the Government, a beneficiary, even though recognized, is subject to the defenses of the promisor. The promisor was found to have the defense of want of consideration for his promise to assume the taxes. The grantor and grantee had bargained on the assumption that the price of the land was \$18,000. From this fact the court reasoned that if the conveyance of the land was the consideration for the purchase price there was no consideration for the purchaser's promise of assumption. The decision has tenuous basis since a single consideration may support any number of promises and its economic adequacy is legally irrelevant.

Assignments: Rights of Successive Assignees.—There are conflicting views on the rights of successive assignees of a chose in action. Under the rule known as the American rule, the assignee who is first in point of time prevails with certain exceptions. Under the rule known as the English rule the assignee who first gives notice to the obligor prevails, even though his assignment may be later in time. The Virginia courts have been generally cited as adhering to the English rule. The supreme court of that state was recently called upon to determine the rights of successive assignees; one was earlier in time of assignment but later in time of notice, the other was later in time of assignment but earlier in time of notice.¹⁵ The court examined *Coffman v. Liggett's Administrator*,¹⁶ which had been considered as committing Virginia to the English rule, and found that the statement in support of the English rule was dictum since the later assignee's superior rights were not based on the fact that he first gave notice but on the fact that the earlier assignee's rights had been divested. The subject matter

¹⁵ *Evans v. Joyner*, 195 Va. 85, 77 S.E.2d 420 (1953).

¹⁶ 107 Va. 418, 59 S.E. 392 (1907)

of the successive assignments in the *Coffman* case had been an insurance policy which the earlier assignee left in the possession of the assignor. The policy was delivered to the later assignee who was recognized and accepted by the insurance company as the rightful owner of the policy. The success of the later assignee was explained on the basis that the first assignee acquired equitable title and the second assignee acquired legal and equitable title, so with the equities equal the law prevailed. Having distinguished *Coffman v. Liggett's Administrator*, the court examined the reasons given in support of the respective rules and decided that the reasons upon which the American rule is based are sound and to be preferred over those upon which the English rule is based.

Restitution to the Contract-Breaker.—A contract-breaker who cannot avail himself of the doctrine of substantial performance or the concept of divisible contract so as to claim relief upon the contract has often found that he is denied relief off the contract by way of restitution, particularly if he is subject to characterization as a wilful contract-breaker. It is over a century since Chief Justice Parker made the point, in *Britton v. Turner*,¹⁷ that the denial of quasi-contractual relief to the contract-breaker penalizes him in inverse proportion to the size of his breach. The closer the contract-breaker is to full performance of the contract the more he forfeits as a consequence of the denial of restitution. Cases in Ohio¹⁸ and Wisconsin¹⁹ have declared the desire of the courts in those states to dispense even-handed justice by according to the contract-breaker a remedy for restitution in the amount by which the benefit to the aggrieved party from the defective performance exceeds the injury resulting from the breach of contract.

The Ohio case involved an appeal from a judgment of the trial court which gave some relief to the contract-breaker by use of the concept of divisible contract. The trial court had found that the plaintiff had broken the contract but, on the additional finding that he had performed a severable portion of the contract, gave him a judgment based upon what it considered the part of the total price apportioned to such performance. The contract was a construction contract calling for progress payments, the first payment of \$1,000 being payable when satisfactory work had been done for ten days. The judgment for the plaintiff was based upon the provision for the first progress payment which was considered a severable provision. The plaintiff, who claimed that the reasonable value of his performance to the date of his breach was \$2,985, appealed on the ground that the

¹⁷ 6 N.H. 481 (1834).

¹⁸ *Kirkland v. Archbold*, 113 N.E.2d 496 (Ohio App. 1953).

¹⁹ *Schwartz v. Syver*, 264 Wis. 526, 59 N.W.2d 489 (1953).

trial court's approach improperly limited the amount of his recovery. The appellate court, having determined that the contract was entire and not divisible, reversed the judgment as based upon an improper measure of recovery. The cause was remanded, however, in order to afford the trial court the opportunity to give relief to the contract-breaking plaintiff to the extent that the reasonable value of the work done exceeded the damage suffered by the aggrieved defendant.

The Wisconsin court's espousal of the view making restitution available to a contract-breaker brought little solace to the defaulter involved in the law suit. The court held that the defaulter had not sustained his burden of proving that the benefit conferred on the aggrieved party exceeded the damages caused by the breach of contract. The defaulter, who had made a \$500 down payment on a contract purchase price of \$9,500, proved that the seller had resold the property for \$11,000 but produced no evidence of the loss caused by his repudiation. The decision is a consequence of the court's adoption of the restitution principle with reservation, the limitation being that the principle is not to be applied to permit the recovery of moderate payments of earnest money. A dissenting judge was of the opinion that the evidence of resale by the seller at a \$1,500 advance in price *prima facie* established that the seller had sustained no loss by reason of plaintiff's breach of contract, shifting to the seller the burden of proving such special damages as would warrant forfeiture of the down payment.

Unconscionable Bargains.—Unconscionability of bargain is an established basis for denying equitable relief to a person who has taken too great advantage of his bargaining position. This year we have evidence that the denial of equitable relief may operate at least to curb further overreaching by the person affected by the denial. In 1948 the Campbell Soup Company was denied the equitable remedies of injunction and specific performance against growers who had contracted to sell to Campbell crops to be grown upon their land.²⁰ Campbell's form contract, although not illegal, was considered to be too hard a bargain and too one-sided an agreement to entitle Campbell to relief in a court of conscience. A more recent request of Campbell for equitable relief in the form of an injunction was granted.²¹ All provisions of the form contract which had evoked any degree of disapprobation in the earlier case had been redrafted. The provision which had drawn the severest censure was one which excused Campbell under certain enumerated circumstances but precluded the grower from disposing of his produce elsewhere except upon the written consent of Campbell. The redrafted contract eliminated the limitation on free disposal

²⁰ *Campbell Soup Co. v. Wentz*, 172 F.2d 80 (3d Cir. 1948).

²¹ *Campbell Soup Co. v. Diehm*, 111 F. Supp. 211 (E.D. Pa. 1952).

upon assertion by Campbell of the privilege of rejection. The earlier contract had a liquidated damage provision in case of default by the grower but no such provision to cover default by Campbell. The redraft contained no liquidated damage provision. Again, the earlier contract made the determination of Campbell as to the conformity of the produce to the specifications conclusive. This provision was revised in the redraft, under which conformance was made to depend upon standards established by the United States Department of Agriculture and grading was to be performed by graders licensed by the United States Department of Agriculture and assigned to the loading platforms by the state department of agriculture.

Unconscionability of bargain is not as firm a basis for denying legal relief. As a consequence, courts, although primarily motivated by unconscionability of bargain, have been prone to base their denial of legal relief on other grounds. Resort may be had to the technique of "reasonable" interpretation, or the doctrines of mistake, fraud, misrepresentation or undue influence may be stretched to justify the denial of legal remedies. The proposed Uniform Commercial Code permits a more direct approach by providing, "If the court finds the contract or any clause of the contract to be unconscionable it may refuse to enforce the contract or may strike any unconscionable clauses and enforce the contract as if the stricken clause had never existed."²²

Statute of Frauds: Admissibility of Parol Evidence to Connect Several Writings.—The ability of a litigant to satisfy the Statute of Frauds' requirement of a sufficient and signed note or memorandum may depend upon the extent to which he is permitted to make use of several separate writings. A severe handicap is imposed upon the litigant if he is limited to the use of writings whose connection with each other can be established without the use of parol evidence. A substantial and growing body of authority refuses to impose this severe handicap, allows the use of parol evidence to show connection between several separate writings, and depends upon judicial discernment to prevent frustration of the legislative purpose of prevention of fraud. These courts are attempting to curtail use of the Statute of Frauds as a refuge for persons who seek to avoid the consequences of their poor business judgment. The inspiration for allowance of the use of parol evidence to connect writings is often found in the leading case of *Beckwith v. Talbot*.²³ This year the New York Court of Appeals, pointing out that prior cases in New York had varied in attitude, manifested its willingness to permit parol evidence of the circumstances surrounding the execution of separate writings so as to connect

²² Uniform Commercial Code § 2-302 (1951).

²³ 95 U.S. 289 (1877).

them if on their face they refer to the same subject matter or transaction.²⁴ The court stated:

None of the terms of the contract are supplied by parol. . . . Parol evidence—to portray the circumstances surrounding the making of the memorandum—serves only to connect the separate documents and to show that there was assent, by the party to be charged, to the contents of the one unsigned. If that testimony does not convincingly connect the papers, or does not show assent to the unsigned paper, it is within the province of the judge to conclude, as a matter of law, that the statute has not been satisfied. True, the possibility still remains that, by fraud or perjury, an agreement never in fact made may occasionally be enforced under the subject matter or transaction test. It is better to run that risk, though, than to deny enforcement to all agreements, merely because the signed document made no specific mention of the unsigned writing.²⁵

Anticipatory Breach and Mitigation of Damages.—With the maturity of thinking concerning anticipatory breach of contract, it is recognized that the damages recoverable by the nonrepudiating party are to be affected by the doctrine of mitigation of damages. Thus, a seller of goods to be manufactured would be under a disability to recover increased damages which he had incurred by continuing to manufacture the goods after a clear and unequivocal repudiation. However, agreement on the principle of the application of the doctrine has not resulted in agreement on the details of its application. Disagreement is evident in cases considering the question whether a seller's damages (normally measured by the difference between the contract price and the market price at the time set in the contract for acceptance) are affected by the fact that, after the repudiation and before the time set for acceptance, he could have made a more favorable resale than could be made at the time set for performance, and the analogous question as to whether a buyer's damages are to be affected by his failure to make a covering contract. The view was taken in *Reliance Cooperage Corp. v. Treat*²⁶ that a buyer was entitled to the difference between the contract price and the market price at the time set for delivery even though it would have been possible for the buyer to have minimized his damages by making a covering contract in a steadily rising market. The court was of the opinion that the doctrine of anticipatory breach was for the benefit of the injured party and should not be converted into a doctrine for the benefit of the repudiator by use of the doctrine of mitigation of damages. Editorial comment on the case has been adverse.²⁷

²⁴ *Crabtree v. Elizabeth Arden Sales Corp.*, 305 N.Y. 48, 110 N.E.2d 551 (1953).

²⁵ *Id.* at 55-56, 110 N.E.2d at 554.

²⁶ 195 F.2d 977 (8th Cir. 1952).

²⁷ 7 Southwestern L.J. 97 (1953).

A number of jurisdictions take the view that damages, in instances of anticipatory breach, are determined as of the time of the repudiation. In such case there is usually no occasion for consideration of the effect of failure of a seller to resell or of a buyer to cover in reducing the recoverable damages. However, in *Friedman Iron & Supply Co. v. J. B. Beird Co.*,²⁸ a repudiating buyer wished to make use of the failure of the seller to resell. The injured seller had retained the goods up to the time of trial, at which time their market price was higher than the contract price. The buyer proved these facts and argued that the seller had not been injured by the breach and was not entitled to damages. Three hearings of the case on appeal did not bring the judges to a unanimous decision. The majority of the court refused to accept defendant's contention.

Restrictive Covenants.—Several cases have declared the invalidity of a covenant in an employment agreement restricting the employee from competing with the employer after termination of the employment relation where the covenant stated no territorial limits.²⁹ In reaching this conclusion a West Virginia court made a rather interesting statement:

However, it is the opinion of this Court that a contractual covenant without territorial limitation between an employer and an employee, restraining the employee from engaging in business similar to that of the employer, is void because it is unreasonable and against public policy. Therefore, being void, the Court will not undertake to reduce the territorial limits which otherwise it might do in a case where the territorial limits were stated and were too extensive.³⁰

Elsewhere in the opinion the court speaks of the "tendency to shave unreasonable territorial limits of such contracts, where possible, to the proper scope necessary to effect their purposes." It would appear that the court's reasoning prevents it from shaving unreasonable territorial limits which are stated in indivisible terms so as to eliminate the possibility of "blue pencilling." Such a provision would be "void because it is unreasonable and against public policy," and, therefore, the type of provision as to which the court maintains a hands-off attitude. If the West Virginia court is consistent its future decisions will not be as liberal as some of its language might indicate.

Arbitration.—*Reconstruction Finance Corp. v. Harrisons & Crossfield, Ltd.*³¹ has indicated the alarming possibility that in New York the arbitration process may be used as a device for the enforcement of

²⁸ 222 La. 627, 63 So.2d 144 (1953), 37 Marq. L. Rev. 76.

²⁹ *Segal v. Fleischer*, 93 Ohio App. 315, 113 N.E.2d 608 (1952); *Pancake Realty Co. v. Harber*, 73 S.E.2d 438 (W. Va. 1952).

³⁰ *Pancake Realty Co. v. Harber*, supra note 29 at 443.

³¹ 204 F.2d 366 (2d Cir. 1953).

stale claims. A claim for breach of contract had arisen in 1942. Over nine years later the aggrieved party filed a petition, under the Federal Arbitration Act, to compel arbitration in conformity with an arbitration provision in the contract. Since the petition was filed in a federal court sitting in New York, it was assumed that the New York statute of limitations was applicable in the absence of a federal statute of limitations. In applying the New York statute of limitations, the federal court distinguished between the breach of the substantive obligations of the contract and the breach of the agreement to arbitrate. It decided that the statute did not begin to run as to the agreement to arbitrate until demand for arbitration and refusal. Arbitration being ordered, it was within the province of the arbitrators to determine the effect to be given to the fact that the statute of limitations had run on the breach of the substantive obligations of the contract. The court admitted that a failure of the arbitrators to give effect to the statute of limitations so far as applicable to the substantive obligations would, in all probability, not be a matter for judicial review. The decision does recognize that, since the aggrieved party was seeking equitable relief in the form of specific performance of the agreement to arbitrate, the doctrine of laches might bar relief even though the statute of limitations did not. However, the court held that a person seeking to use the doctrine of laches to bar relief not yet barred by the statute of limitations had the burden of showing that extraordinary circumstances existed which required application of the doctrine. This burden had not been sustained in the principal case. The court's reply to the suggestion that its decision would discourage the insertion of arbitration clauses in contracts was, "the parties to a contract embodying an arbitration clause can, of course, easily put in it an 'express time limitation.'"

Historically, courts have frowned on arbitration provisions as representing attempts to oust them of their jurisdiction. The judicial attitude has changed, influenced by the enactment of arbitration statutes. Here and there, however, we find anachronistic judicial attitudes toward arbitration. One such attitude is reflected in the hostility shown in many jurisdictions toward attempts to incorporate arbitration provisions by reference. Unfortunately the contract draftsman has not always been aware of the hostile attitude. In New York, contract draftsmen have persisted in the practice of incorporating arbitration provisions by reference in the face of a considerable body of authority to the effect that the incorporation was operative only if the contracting parties were aware that the incorporated document contained an arbitration provision.³² At last, as a result of the decision

³² *Matter of General Silk Importing Co.*, 198 App. Div. 16, 189 N.Y. Supp. 391

of the Court of Appeals of New York in *Level Export Corp. v. Wolz, Aiken & Co.*,³³ decisional law and drafting practice are now in accord. A buyer sought to stay arbitration proceedings instituted by the seller on the ground that no arbitration agreement existed between the parties. The two contracts signed by the buyer contained the following provision: "This Salesnote is subject to the provisions of Standard Cotton Textile Salesnote which, by this reference, is incorporated as a part of this agreement and together herewith constitutes the entire contract between buyer and seller. No variation therefrom shall be valid unless accepted in writing." The standard cotton textile salesnote provided as follows: "Any controversy arising under, or in relation to, this contract, shall be settled by arbitration. If the parties are unable to agree respecting time, place, method, or rules of the arbitration, then such arbitration shall be held in the City of New York in accordance with the laws of the State of New York and the rules then obtaining of the General Arbitration Council of the Textile Industry and the parties consent to the jurisdiction of the Supreme Court of said State and further consent that any process or notice of motion or other application to the Court or a Judge thereof may be served outside of the State of New York by registered mail or by personal service, provided a reasonable time for appearance is allowed." The buyer bottomed his contention that no arbitration agreement existed between the parties on the fact that he was not aware that the integrated standard cotton textile salesnote contained an arbitration provision. The Court of Appeals decided that the buyer's contention was inconsistent with the objective approach and its corollary that when a party to a written contract accepts it as a contract he is bound by the stipulations and conditions expressed in it, whether he reads them or not.

(1st Dep't 1921); *Matter of Bachmann, Emmerich & Co.*, 204 App. Div. 282, 197 N.Y. Supp. 879 (1st Dep't 1923); *Gold Plastering Co. v. 200 East End Ave. Corp.*, 280 App. Div. 942, 116 N.Y.S.2d 63 (2d Dep't 1952); *Application of Riverdale Fabrics Corp.*, 281 App. Div. 831, 118 N.Y.S.2d 569 (2d Dep't 1953).

³³ 305 N.Y. 82, 111 N.E.2d 218 (1953). For another aspect of arbitration see *Note, Validity and Enforceability of Government Agent's Arbitration Agreement*, 53 Col. L. Rev. 879 (1953).

AGENCY AND PARTNERSHIP

GEORGE H. WILLIAMS

IN AN ATTEMPT to increase the usefulness of the *Restatement of Agency* the American Law Institute considered possible changes at its May 1953 meeting.¹ Dealing with only a few representative sections, the draft explores the possibility of what might be done in a republication of the work. It is estimated by the reporter that as many as one-fourth of the sections would require redrafting, modification or expanded comment. The proposed changes clearly have the effect of reducing ambiguity as in the definition and comment on subagent.² Thus, also by way of innovation, is the enumeration of reasons for certain sections where the rule is obscure or where authority is in serious conflict. Ratification and its rationale lends itself to this treatment very readily.³

The cases in the past year were lower in volume and on the whole free of unusual significance. Some few cases, though in the traditional pattern, are worthy of attention.

I

AGENCY

Course of Employment.—The liability of a principal for a fraud committed by his agent on a third person was raised in a unique situation in Tennessee. The employee of a construction company, who by virtue of his employment had access to a bank vault, stole currency which he placed in the coffers of his employer to cover up defalcations for which he was responsible. The insurer of the bank made good the loss and sought recovery from the insurer of the construction company. The court allowed recovery on the ground that the construction company did not receive the money "in the course of trade" and parted with no valuable consideration. It was a mere depository for the thief.⁴ One judge dissented on the ground that the receiver

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¹ Restatement of the Law Continued: Agency, Tentative Draft No. 1 (May 1, 1953).

² Thus, the original Section 5 reads: "A subagent is a person to whom the agent delegates, as his agent, the performance of an act for the principal which the agent has been empowered to perform through his own representative." The revised section states: "A subagent is a person appointed by an agent to perform business entrusted by the principal to the agent and for whose conduct it is agreed between the principal and agent that the agent shall be responsible to the principal."

³ Section 82. Although the blackletter remains as in the original, an expanded comment points out difficulties of application and unique aspects of ratification.

⁴ *Stone & Webster Engineering Corp. v. Hamilton Nat. Bank*, 199 F.2d 127 (6th

of the stolen money acted in good faith and without notice of its tainted character; that this was a question of the law of negotiable instruments and that the employee's transfer of the cash as a credit on a pre-existing indebtedness enabled the company to become a holder in due course. This is a curious type of reasoning, particularly in view of that portion of the *Restatement* which subjects a principal to liability who puts an agent in a position that enables him to commit a fraud.⁵ Here, there can be no question that the theft was made possible by the nature of the thief's employment.

In New York, a truck driver was held to have departed from the course of his employment in carrying out an assault on the driver of a vehicle with which he had collided.⁶ The decision is difficult to appreciate since it seems to depart from conventional standards for measuring whether an act is within or without the employment.⁷ The assault was committed during a dispute over the refusal of the driver of the defendant's truck to exchange license numbers. To say that the assaulting driver accomplished nothing "which might be said to benefit, or to have been intended to benefit his employer" disregards the requirement of motor-vehicle operators to exchange such information in such situations.⁸

Apparent Authority.—An automobile dealer was held liable for the down payments on "new" Plymouths, embezzled by his salesman, where the salesman was authorized to sell only new Studebakers and other makes of used cars.⁹ In the receipt held by the defrauded plaintiff the salesman had written that a new car was to be delivered. The plaintiff testified that he had in mind a car of the then current year but not necessarily a "new" car. Relying on this fact and the fact that the balance due was left blank the court reasoned that what the parties really meant was a 1948 Plymouth in excellent condition. Had a new Plymouth been intended the price could easily have been ascertained and filled in on the receipt and order. Thus, the court sidestepped the question of the agent's apparent authority and was able to bring the agent's act within the actual authority to sell used cars of any make.

Brokers.—In an exceedingly interesting and well-reasoned case a broker was denied commissions under a contract giving him the ex-

Cir. 1952), 28 N.Y.U.L. Rev. 1037.

⁵ Restatement, Agency § 261 (1933).

⁶ Sauter v. New York Tribune, Inc., 305 N.Y. 442, 113 N.E.2d 790 (1953).

⁷ Riley v. Standard Oil Co., 231 N.Y. 301, 132 N.E. 97 (1921); Joyce v. Southern Bus Lines, Inc., 172 F.2d 432 (5th Cir. 1949).

⁸ N.Y. Veh. & Traf. Law § 70(5)(a).

⁹ Michael v. Kircher, 335 Mich. 566, 56 N.W.2d 269 (1953).

clusive right to sell certain stock at a specified sum.¹⁰ Under the contract the broker was to become entitled to commissions "upon completion of the transaction." The court found that this point had never been reached since the proposed sale price had never been acceptable to the prospective purchaser secured by the broker. The modified purchase price, while agreed to by each of the parties, was embodied in a contract which gave either party the option to cancel and which was in fact canceled by the owners of the stock. The dissent proceeded on the theory that the seller became liable for the broker's commissions when the buyer had advised "the escrowee of its readiness and willingness to complete the contract."¹¹ The words "upon completion of the transaction" were reasoned to fix the time of payment rather than to create a condition precedent to liability.

Compensation of Agent.—There appeared again this year, that troublesome species of brokerage the "exclusive right of sale."¹² One tends to be unconvinced by the argument that the exclusive right of sale entitles the broker to a commission even where the sale is initiated, negotiated and completed by the owner. This is especially true where the owner had the option to terminate the broker's employment when he became dissatisfied with the broker's efforts. What can be more convincing evidence of dissatisfaction than the owner taking the matter into his own hands? Yet for failure to "terminate" the broker's employment the owner was held liable for commissions.¹³ This is a legalism that must be curious to a court; how much more so to the businessman.

While in litigation the broker normally seeks recovery of commissions from the owner, a recent New Jersey case found the broker pursuing a purchaser in a tort action for wrongful interference with the broker's right to earn a commission.¹⁴ The alleged interference was the action of the purchaser who denied that he had had dealings with the plaintiff broker and secured the property from the owner at a lesser price than that for which the owner had authorized a sale by the broker. It is entirely proper in these actions to permit recovery

¹⁰ *Wiesenberger v. Mayers*, 281 App. Div. 171, 117 N.Y.S.2d 557 (1st Dep't 1952). The majority found it unnecessary to consider the question of whether the brokerage contract with the plaintiff was rendered unenforceable by the oral change of purchase price under N.Y. Pers. Prop. Law § 31(10). The dissenting opinion suggested that it could not have been the legislative intent that a new brokerage contract would have to be executed each time there was a modification in the purchase price during negotiations.

¹¹ *Id.*, at 179, 117 N.Y.S.2d at 564.

¹² For cases distinguishing between "exclusive agency" and "exclusive right of sale" see *Harris v. McPherson*, 97 Conn. 164, 115 Atl. 723 (1922); *Des Rivieres v. Sullivan*, 247 Mass. 443, 142 N.E. 111 (1924).

¹³ *Hammond v. C.I.T. Financial Corp.*, 203 F.2d 705 (2d Cir. 1953).

¹⁴ *McCue v. Deppert*, 21 N.J. Super. 591, 91 A.2d 503 (App. Div. 1952).

for such interference. It is as actionable as any other wrongful interference with contractual relations between parties. There is, however, a considerable body of authority which holds to the contrary.¹⁵

Federal Employers' Liability Act.—A case of special interest appeared in *Pope v. Atlantic Coast Line R.R.*¹⁶ Here a Georgia court was held to have no authority to enjoin a suit brought in Alabama under the Act for injuries sustained in the former state. The result has been criticized as conflicting with "traditional concepts of state authority."¹⁷ The dissent proceeded on the grounds that the decision disregarded the intention of Congress to make the administration of the Act uniform;¹⁸ and further that an anomalous situation prevails where the injured party brings suit in a state which rejects the doctrine of *forum non conveniens*.¹⁹

II

PARTNERSHIP

Only a single case warrants mention under this heading. Matters of taxation in partnership are treated elsewhere.

The New York Court of Appeals considered the question of whether a defendant may set up a counterclaim against partners, in a limited partnership seeking to enforce a partnership claim, in which he alleges causes of action not related to partnership affairs. It was held that such a counterclaim could not be maintained.²⁰ The defendant had contended that a partnership is not a separate entity apart from the individuals who compose it and, consequently, in an action by the partnership upon a partnership claim it was proper to counterclaim against individual members. The court agreed with the plaintiffs, however, that the limited partnership is a separate entity—a "creature of statute"; that in a partnership suit the individual partners are not the plaintiffs and a counterclaim which seeks to compel individual liabilities is improper.

¹⁵ See 26 Temple L.Q. 440 (1953) and cases cited therein.

¹⁶ 345 U.S. 379 (1953).

¹⁷ 6 U. of Fla. L. Rev. 262, 265 (1953).

¹⁸ 62 Stat. 937 (1948), 28 U.S.C. § 1404(a) (Supp. 1952).

¹⁹ Mr. Justice Frankfurter said the majority had created a haven "in which the choice of a harassing forum . . . can be carried on by virtue of our 'judicial gloss' although it would not be tolerated in other courts in the United States, including those over which we have supervising authority." *Pope v. Atlantic Coast Line R.R.*, 345 U.S. 379, 387, 393 (1953).

²⁰ *Ruzicka v. Rager*, 305 N.Y. 191, 111 N.E.2d 878 (1953).

CORPORATIONS

MIGUEL A. DE CAPRILES AND BERT S. PRUNTY, JR.

IT HAS been our custom to defer the writing of the traditional introductory paragraphs on corporation law until after completion of the main body of our annual article. Each year we have been impressed with the rich variety of legislative and judicial developments in the field, and 1953 is no exception. Again it is difficult to single out a statute or a case for pre-eminent treatment here. Let us then simply point out that two states, Florida and Oregon, have enacted new, comprehensive general corporation laws;¹ and, let us invite the reader to review the other highlights of the year in the pages that follow.

I

DERIVATIVE ACTIONS

What is a Derivative Action?—Prior to the enactment of legislation drastically restricting stockholders' actions through the imposition of security requirements, it was often of minor importance to determine whether such actions sought to vindicate the individual right of the stockholders or the right of the corporation. The security-for-costs statutes, however, usually apply to derivative suits only, *i.e.*, those brought in the right of the corporation.² Thus a proper characterization of the action is essential on the one hand to implement the legislation, and on the other to avoid complete strangulation of the rights of small investors. Last year, in these pages and elsewhere, we noted the striking failure on this question of a competent and well-regarded court.³ This year two decisions can be cited as examples of the careful analysis and close reasoning necessary to the proper determination of borderline cases. Both actions were brought to enjoin the issue of option stock, but the gravamen of each was distinct. In

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¹ Fla. Laws 1953, c. 28170, eff. Oct. 1, 1953, adding Fla. Stat. § 608; Ore. Laws 1953, c. 549, eff. Dec. 31, 1953, adding the Ore. Bus. Corp. Law to Ore. Comp. Laws Ann. tit. 77, cc. 1, 2, 3.

² E.g., N.Y. Gen. Corp. Law § 61(b).

³ *Gordon v. Elliman*, 280 App. Div. 655, 116 N.Y.S.2d 671 (1st Dep't 1952), discussed in 1952 Annual Surv. Am. L. 407, 28 N.Y.U.L. Rev. 470 (1953); 1953 Survey of New York Law; 28 N.Y.U.L. Rev. 1429. The case is criticized in Notes, 41 Calif. L. Rev. 546 (1953), 38 Cornell L.Q. 244 (1953); and Recent Cases, 28 N.Y.U.L. Rev. 432 (1953), 19 Brooklyn L. Rev. 312 (1953), 53 Col. L. Rev. 437 (1953), 22 Ford. L. Rev. 97 (1953), 27 St. John's L. Rev. 360 (1953). Cf. *Christie v. Fifth Madison Corp.*, 124 N.Y.S.2d 492 (Sup. Ct. 1953).

one the plaintiff based his right to relief upon an allegation of inadequate consideration.⁴ In the other, the complainant attacked the legality of the issue for failure to meet statutory requirements for stockholder approval.⁵ The former clearly involved an injury to the corporation through the alleged mismanagement and waste of the directors; the latter involved the failure to respect the rights of stockholders as individuals to preserve their relative positions within the capital structure. The former action was derivative and the plaintiff must qualify under the security-for-costs statute; the other was beyond the scope of the legislation.

Another situation was presented by a stockholder's motion to intervene in a pending action in which his corporation was the plaintiff and the defendant was another corporation having interlocking directors with the plaintiff. The basic action was for a declaratory judgment to test an intercorporate contract under the antitrust laws. To support his intervention the stockholder alleged that the contract was unreasonably favorable to the defendant corporation with a resultant loss to the stockholders in the plaintiff corporation, and a lack of will on the part of plaintiff's directors to proceed vigorously because of common interest. In denying intervention, the court reasoned the action was that of the corporation and that a stockholder had no right to interfere with the judgment of the directors on such matters. If the stockholder wished to question that judgment or the loyalty of the directors, he could do so in a derivative action upon compliance with the statutory conditions.⁶

Security for Expenses.—The harshness of the antistrike-suit legislation referred to in the preceding section has been mitigated by the judicially developed "conditional" order for security which permits the plaintiff to gain time for others to join and thereby avoid the security requirement. The forging of this salutary concept has been traced in these volumes.⁷ A new note was struck this year when, during the time the action was stayed under the conditional order, both sides actively campaigned among the balance of the stockholders. At the end of this period plaintiff had recruited the requisite aggregate of shares and moved to vacate the security order. Defendant resisted by arguing that plaintiff's converts were induced by false or misleading statements. In principle, such a development does not force the court's hand one way or the other; in this case the court neatly com-

⁴ Selman v. Allen, 121 N.Y.S.2d 142 (Sup. Ct. 1953).

⁵ Horwitz v. Balaban, 112 F. Supp. 99 (S.D.N.Y. 1953).

⁶ General Aniline & Film Corp. v. General Dyestuff Corp., 123 N.Y.S.2d 535 (Sup. Ct. 1953).

⁷ See 1950 Annual Surv. Am. L. 448-50; 1951 Annual Surv. Am. L. 456-57.

promised by directing the plaintiff to send, within ten days and by registered mail, to each affected stockholder a copy of the court's opinion pointing out the true facts concerning the misleading statements.⁸

The California statute, more reasonable than most, has been less litigated.⁹ This year its constitutionality was attacked on the ground that it was discriminatory insofar as it required the plaintiff in a derivative action to furnish security for the expenses of a director who also happened to be the third party alleged to hold corporate property wrongfully.¹⁰ This interesting point, if properly raised, probably would not suffice under the broad language of the leading case on the constitutionality of these statutes;¹¹ but it was side-stepped by the appellate court in California. Since the required security had not been posted, the action had been dismissed as to the corporation; and if the corporation is no longer a party, plaintiff has no authority to proceed with the derivative action. The action must be dismissed as to all defendants.

Parties.—The growing list of jurisdictions in which the contemporaneous ownership rule is in force¹² now includes Nevada. The supreme court of that state has adopted the requirement as a rule of civil procedure applicable to derivative actions commenced after January 1, 1953.¹³ The same court appears to have determined the rule to be a matter of common law¹⁴ in a recent case of first impression in Nevada, involving a derivative action instituted before the effective date of the rule of procedure by a plaintiff who had purchased his shares long after the transactions complained of and a few days before commencing suit, where the only other shareholder having similar interest in the litigation was barred from maintaining the action on the ground of laches.¹⁵ Elsewhere, a federal court has

⁸ *Neuwirth v. Wyman*, 119 N.Y.S.2d 266 (Sup. Ct. 1953).

⁹ See 1952 Annual Surv. Am. L. 392-94, 28 N.Y.U.L. Rev. 455-57 (1953).

¹⁰ *Beyerbach v. June Oil Co.*, 254 P.2d 632 (Cal. App. 1953).

¹¹ *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).

¹² The rule, requiring the plaintiff in a derivative action to show that he was a shareholder at the time of the alleged wrong or that his stock devolved upon him by operation of law from such a shareholder, has long been in force in the federal courts and in recent years has been adopted by statute in California, Delaware, New Jersey, New York and Wisconsin. See 1951 Annual Surv. Am. L. 458; 1949 Annual Surv. Am. L. 559; 1948 Annual Surv. Am. L. 506-07. In contrast to this trend, Maryland recently repealed its statutory contemporaneous ownership requirement. See 1951 Annual Surv. Am. L. 458.

¹³ *Nev. R. Civ. P.* 23(b).

¹⁴ *Hawes v. Oakland*, 104 U.S. 450 (1881); *Home Fire Ins. Co. v. Barber*, 67 Neb. 644, 93 N.W. 1024 (1903). The leading case for the contrary proposition is *Pollitz v. Gould*, 202 N.Y. 11, 94 N.E. 1088 (1911), which, however, has been superseded by N.Y. Gen. Corp. Law § 61.

¹⁵ *Gascue v. Saralegui Land & Livestock Co.*, 255 P.2d 335 (Nev. 1953). Cf.

applied the federal rule¹⁶ in a routine case.¹⁷ A recent law review comment helpfully reviews the legal position of the various parties to a derivative action in relation to the defenses that may be asserted by them.¹⁸

Private Suits for Violations of the Antitrust Laws.—The *Paramount Pictures* case criticized here last year has been reversed.¹⁹ This decision is of fundamental importance because it makes possible, for the first time, derivative actions for treble damages under Section 4 of the Clayton Act²⁰ for violation of the antitrust laws. With one dissent,²¹ the federal court of appeals held that under the new Federal Rules of Civil Procedure there is no bar to the submission of the antitrust issues, including damages, to a jury, even though the court alone decides the equitable issues peculiar to the derivative action. This reasoning is careful and sound; the result is certainly commendable as a general procedural precedent.

Counsel Fees.—A Delaware court has held the plaintiff in a derivative action may have reimbursement from the corporation for reasonable expenses, including counsel fees, incurred prior to demand upon the directors, for the investigation and preparation of the case, even though shortly after the institution of suit the case was settled.²² The supreme court of the same state has refused an attorney's motion for additional compensation on an hourly basis for work done on an appeal when the trial court had made a percentage allowance on the basis of the alleged savings to the corporation. No additional savings were effected by the appeal.²³

II

CORPORATE MANAGEMENT

Charitable Contributions.—Of far-reaching consequence, both from the viewpoint of social welfare and managerial power, is the

Bank of Mill Creek v. Elkhorn Coal Corp., 133 W. Va. 639, 57 S.E.2d 736 (1950), 1950 Annual Surv. Am. L. 451.

¹⁶ Fed. R. Civ. P. 23(b).

¹⁷ *Bowman v. Alaska Airlines, Inc.*, 14 F.R.D. 70 (D. Alaska 1952). The court properly struck from the complaint all allegations of noncontinuing wrongs which took place before the plaintiff acquired his shares.

¹⁸ Note, *Defenses in Shareholders' Derivative Suits—Who May Raise Them*, 66 Harv. L. Rev. 342 (1952).

¹⁹ *Fanchon & Marco, Inc. v. Paramount Pictures, Inc.*, 202 F.2d 731 (2d Cir. 1953), reversing 107 F. Supp. 532 (S.D.N.Y. 1952), noted in 1952 Annual Surv. Am. L. 390-91, 28 N.Y.U.L. Rev. 453-54 (1953); 52 Mich. L. Rev. 155 (1953).

²⁰ 38 Stat. 731 (1914), 15 U.S.C. § 15 (1946).

²¹ *Fanchon & Marco, Inc. v. Paramount Pictures, Inc.*, 202 F.2d 731, 735 (2d Cir. 1953).

²² *Kaufman v. Shoenberg*, 92 A.2d 295 (Del. Ch. 1952). A similar New York case is *Martin Foundation, Inc. v. Phillips-Jones Corp.*, 204 Misc. 120, 123 N.Y.S.2d 222 (Sup. Ct. 1953).

²³ *Braun v. Fleming-Hall Tobacco Co.*, 93 A.2d 495 (Del. 1952).

legislative and judicial acceptance of a charitable role for business corporations. New statutes specifically authorizing corporate donations to charity have been enacted by New Hampshire,²⁴ Nevada,²⁵ Washington²⁶ and Massachusetts.²⁷ On the judicial side, the Supreme Court of New Jersey has rendered a landmark decision on the subject.²⁸ The case tested the validity of a contribution by a manufacturing corporation to Princeton University for general, unrestricted purposes, thereby raising the major issues involved in the type of corporate giving which educational institutions wish to encourage. The pre-existing but scant case law seemed to require that, to be valid, a gift must be likely to bring the corporation a somewhat direct and fairly immediate benefit or be somehow related to the purposes of the corporation.²⁹ But this ultra vires approach was expressly rejected by both the trial³⁰ and appellate courts: The gift was upheld under evolving common-law principles of managerial authority apart from statute.

In addition the court sustained the donation under the New Jersey contribution statute³¹ enacted after this corporation was formed. In view of the fact that New Jersey had previously taken an exceptionally narrow view³² of the scope of the state's reserved power to amend corporate charters, the court's upholding of a retroactive application of the statute is of fundamental significance. The reserved power is no longer limited to the "contract" between the state and the corporation; it now includes the "contract" between the corporation and the stockholders and the "contract" among the stockholders themselves, provided a public interest is involved. Thus modified, the "New Jersey view" in substance agrees with the position of the Pennsylvania constitution and seems sound.³³

²⁴ N.H. Rev. Laws c. 274, § 4(8) (Supp. 1953), added by N.H. Laws 1953, c. 71.

²⁵ Nev. Laws 1953, c. 160.

²⁶ Wash. Rev. Code § 23.46.010 (Supp. 1953), discussed in Note, Corporate Charitable Contributions, 28 Wash. L. Rev. 167 (1953).

²⁷ Mass. Laws 1953, c. 415.

²⁸ A. P. Smith Mfg. Co. v. Barlow, 13 N.J. 145, 98 A.2d 581, appeal dismissed, 346 U.S. 861 (1953).

²⁹ See de Capriles & Garrett, Legality of Corporate Support to Education: A Survey of Current Developments, 38 A.B.A.J. 209 (1952).

³⁰ A. P. Smith Mfg. Co. v. Barlow, 26 N.J. Super. 106, 97 A.2d 186 (Ch. Div. 1953).

³¹ N.J. Stat. Ann. § 14:3-13 (Supp. 1953).

³² Zabriske v. Hackensack & N.Y.R.R., 18 N.J. Eq. 178 (1867). Cf. Durfee v. Old Colony & Fall River R.R., 87 Mass. 230 (1862).

³³ Cf. public interest limitation in Pa. Const., Art. 16, § 10. For other states that have recently enacted statutes explicitly authorizing corporate contributions for charitable purposes, see 1952 Annual Surv. Am. L. 388 n.1, 28 N.Y.U.L. Rev. 451 n.1 (1953). See also Hayes, Book Review, 38 Iowa L. Rev. 595 (1953); Stockham, Book Review, [1953] Wash. U.L.Q. 359. Cf. Brudney, Book Review, 8 Law. Guild Rev. 133 (1953); Tunks, Book Review, 62 Yale L.J. 859 (1953).

Management Function.—In prior years, we have noted³⁴ certain "public policy" limitations placed by New York courts upon the so-called "business judgment" rule, which protects management's freedom of action. A 1953 decision by the New York Court of Appeals has further restricted the area of free judgment when the directors are engaged in the liquidation of an insolvent corporation.³⁵ The directors in good faith chose to dispose of the assets by public auction rather than by one of the permissive methods of dissolution under court supervision. The court held, in effect, that by so doing the defendants incurred a liability to creditors for any failure of the assets to bring their "full value." The latter term, of course, is enigmatic, so judicial freedom of action remains. The decision will serve, however, to force directors to adopt the cumbersome statutory procedures on voluntary dissolution which the Legislature did not explicitly make mandatory. Whether such a result is desirable or not is a practical judgment depending upon one's evaluation of court-supervised liquidation as compared with the less expensive but unsupervised auction procedure.

A California case dealt this year with the problem of "sterilizing" the board of directors by a contractual delegation of management powers³⁶ so substantial that it violated the statutory requirement³⁷ of business corporation management by the board of directors. The corporation's sole asset was a management contract; its directors attempted to transfer to the plaintiff in the case the responsibility for carrying out the contract and making policy decisions. The situation is somewhat similar to that in the widely criticized *Long Park* case,³⁸ cited by the court; but there all the stockholders in a small corporation had agreed to the delegation, while here the stock was somewhat more widely held and there was sharp dissension among the shareholders as to the desirability of the contract.

Close Corporations.—Another of the management problems requiring special attention in closely held corporations is that presented by attempts to curb the power of the majority. The somewhat rigid New York construction of its corporation laws is well known,³⁹ as is the ameliorating legislation of 1948.⁴⁰ This year a New Jersey

³⁴ 1947 Annual Surv. Am. L. 666 et seq.; 1948 Annual Surv. Am. L. 518.

³⁵ *New York Credit Men's Adjustment Bureau, Inc. v. Weiss*, 305 N.Y. 1, 110 N.E.2d 397 (1953); 28 N.Y.U.L. Rev. 1176, 17 Albany L. Rev. 1526, 28 Notre Dame Law. 409.

³⁶ *Kennerson v. Burbank Amusement Co.*, 260 P.2d 823 (Cal. App. 1953).

³⁷ Cal. Corp. Code § 800 (Deering 1953).

³⁸ *Long Park v. Trenton-New Brunswick Theatres Co.*, 297 N.Y. 174, 77 N.E.2d 633 (1948), 1948 Annual Surv. Am. L. 517.

³⁹ *Benintendi v. Kenton Hotel*, 294 N.Y. 112, 60 N.E.2d 829 (1945).

⁴⁰ N.Y. Stock Corp. Law § 9. See 1948 Annual Surv. Am. L. 516-17.

court has upheld, in direct conflict with the *Benintendi*^{40a} case, a bylaw requiring a 90 per cent vote for all actions of directors and shareholders in a case involving a New York corporation.⁴¹ The bylaw had been unanimously adopted by the shareholders, and the court enforced it on contract principles. Undoubtedly, the result is preferable to the rule in the *Benintendi* case; the instant case illustrates the realistic treatment that should be accorded close corporations where there are no basic issues of public policy to justify the invalidation of internal contractual arrangements.⁴²

Of importance in this branch of law is a recently published symposium on the close corporation appearing in *Law and Contemporary Problems*.⁴³ This collection is certainly the most complete, extensive and up-to-date law review treatment of the subject.

Authority of Officers and Agents.—The only case to be noted in this connection is a Maryland holding that a district superintendent of the Pullman Company did not have authority to bind the corporation to a lifetime employment contract with an injured employee.⁴⁴ The consideration for the contract was the employee's forbearance to bring legal action for his injuries; employment was actually furnished for twenty-five years but the court felt the top management of the company had neither authorized nor known of the contract and, therefore, the corporation was not bound. Unnecessarily conceptualistic, the case is supported by ample authority.⁴⁵

Personal Liability of Officers and Agents.—Had the plaintiff in the case noted in the preceding section sought to hold the acting corporate agent, it would have been necessary for the court to determine the extent of insulation afforded by the representative capacity. Generally, agency rules protect the representative if he acts for the corporation in a consensual transaction. An exception to

^{40a} *Benintendi v. Kenton Hotel*, 294 N.Y. 112, 60 N.E.2d 829 (1945).

⁴¹ *Hatcher v. Oshman*, 26 N.J. Super. 28, 97 A.2d 180 (Ch. Div. 1953).

⁴² But these "incorporated partnerships" are corporations and do not have the incidents of a true partnership as, for example, dissolution procedure. *Hanes v. Watkins*, 63 So.2d 625 (Fla. 1953); *Hennessy v. During*, 124 N.Y.S.2d 266 (Sup. Ct. 1953).

⁴³ 18 *Law & Contemp. Prob.* 433 et seq. (1953); Contributors are Kramer, Foreword; Hornstein, Judicial Tolerance of the Incorporated Partnership; O'Neal, Giving Shareholders Power to Veto Corporate Decisions: Use of Special Charter and By-Law Provisions; Cataldo, Limited Liability with One-Man Companies and Subsidiary Corporations; Latty, The Aggrieved Buyer or Seller or Holder of Shares in a Close Corporation under the S.E.C. Statutes; Gower, The English Private Company; Triellard, The Close Corporation in French and Continental Law; Lowndes, Taxing the Income of the Close Corporation.

⁴⁴ *Pullman Co. v. Ray*, 94 A.2d 266 (Md. 1953), 51 Mich. L. Rev. 1079, 5 S.C.L.Q. 617.

⁴⁵ See authorities collected in 51 Mich. L. Rev. 1079 (1953).

this rule is made by a New York case holding the allegedly nonstock-holding president of a construction corporation personally liable as a corporate "member" on a union contract. The case is discussed elsewhere.⁴⁶ Another case in the same state reaffirms the well-established principle that an officer or director incurs no liability for inducing the breach of a contract by the corporation in the absence of a showing of bad faith.⁴⁷ Most torts are viewed more seriously; a representative status is no defense. A current example is a federal court decision holding a director liable when he participated in the corporation's conversion of funds (without profit to himself).⁴⁸

More significant is the action of the Supreme Judicial Court of Massachusetts in holding directors personally liable for an unsatisfied tort judgment where the directors liquidated the corporation and distributed its assets without meeting this obligation.⁴⁹ The decision is based upon common-law principles since the Massachusetts statute⁵⁰ providing personal liability for the "debts" of the corporation had previously been held not to apply to claims for involuntary torts.⁵¹ The New York statute is somewhat broader.⁵²

Executive Compensation.—Since the days of the costly Colonel Deeds,⁵³ "incentive plans" based upon the distribution of stock and stock options have occupied a particularly clamorous corner in the legal and business world. Behind the noise, management (and shareholding majorities?) seemed to be holding their ground. Although legal doctrine forbids the giving away of corporate property, the rule of "business judgment" or "directors' discretion" evolved in sufficient breadth to cover most efforts to utilize this form of compensation and profit. Last year we noted⁵⁴ an apparent retreat by the Delaware court in two decisions which invalidated one stock option plan⁵⁵ and sent a second back for trial on the merits.⁵⁶ To the concern

⁴⁶ *Mencher v. Weiss*, 306 N.Y. 1, 114 N.E.2d 177 (1953), discussed in 1953 Survey of New York Law, 28 N.Y.U.L. Rev. 1440.

⁴⁷ *Horan v. John F. Tromer, Inc.*, 124 N.Y.S.2d 217 (Sup. Ct. 1953).

⁴⁸ *Ark-Tenn Distilling Corp. v. Breidt*, 110 F. Supp. 644 (D.N.J. 1953).

⁴⁹ *Burke v. Marlboro Awning Co.*, 113 N.E.2d 222 (Mass. 1953).

⁵⁰ Mass. Ann. Laws c. 156, § 37 (1948).

⁵¹ *Savage v. Shaw*, 195 Mass. 571, 81 N.E. 303 (1907).

⁵² N.Y. Stock Corp. Law § 58, which applies to "any loss sustained by such corporation or by its creditors . . . by reason of such dividend or distribution."

⁵³ *McQuillen v. National Cash Register Co.*, 112 F.2d 877 (4th Cir.), cert. denied, 311 U.S. 695 (1940).

⁵⁴ 1952 Annual Surv. Am. L. 414-15, 28 N.Y.U.L. Rev. 478-79 (1953).

⁵⁵ *Kerbs v. California Eastern Airways, Inc.*, 90 A.2d 652 (Del.), petition for reargument denied, 91 A.2d 62 (Del. 1952). The profit-sharing plan was later held to have been effectively ratified by shareholders. 94 A.2d 219 (Del. Ch. 1953).

⁵⁶ *Gottlieb v. Heyden Chemical Corp.*, 90 A.2d 660 (Del.), reargument granted, 91 A.2d 57 (Del.), reaffirmed in new opinion, 92 A.2d 594 (Del. 1952). Upon remand,

of many,⁵⁷ the court insisted the option be supported by legally sufficient consideration, a doctrine which raised some fine-spun distinctions. But in 1953 the Legislature acted by amending the corporation law, thereby making the judgment of directors, in the absence of fraud, conclusive as to the consideration and its sufficiency for the issuance of rights and stock options.⁵⁸ Thus the statutory rule with respect to the consideration for the issuance of shares is extended to the issuance of options.

Montana has enacted a similar provision this year.⁵⁹ Its statute now authorizes the board of directors, without shareholder approval, to establish health plans, pension plans, stock-option plans, and profit-sharing plans to cover any or all employees including officers. The directors' judgment as to the adequacy of the consideration for such plans is conclusive in the absence of actual fraud.

Pennsylvania also has new legislation on the subject of executive compensation.⁶⁰ Its salient features with respect to stock options are: (1) options may be granted to officers or employees for incentive purposes by resolution of the board upon such terms as the directors deem advantageous to the corporation; (2) interested directors are *not* disqualified from voting on those plans; and (3) a majority of the shares must approve any plan involving officers or directors but such approval is not required if only other employees are involved.⁶¹

the court held the evidence failed to show insufficiency of consideration for the option agreements. 99 A.2d 507 (Del. Ch. 1953). Cf. *Kaufman v. Shoenberg*, 91 A.2d 786 (Del. Ch. 1952).

⁵⁷ See 8 Business Law. 9-12 (Jan. 1953); Rep. of Comm. on Gen. Corp. Law of Del. State Bar Ass'n (1953); Ballantine, *Options v. Ownership*, 25 N.Y. State Bar Bull. 171 (1953); Dean, *Employee Stock Options*, 66 Harv. L. Rev. 1403 (1953); Dwight, *Employee Stock Option Plans: The Clydesdale Rule*, 52 Col. L. Rev. 1003 (1952); Parker, *Stock Purchase Plans for the Rank and File Employee*, 27 St. John's L. Rev. 234 (1953); Seward, *Stock Options and Generally Accepted Accounting Principles*, 8 Business Law. 33 (April 1953); Notes, 41 Calif. L. Rev. 535 (1953), 38 Cornell L.Q. 444 (1953), 51 Mich. L. Rev. 559 (1953), 38 Va. L. Rev. 945 (1952), 39 Va. L. Rev. 335 (1953), 62 Yale L.J. 84 (1952).

⁵⁸ Del. Code Ann. tit. 8, § 157 (Supp. 1954).

⁵⁹ Mont. Rev. Code Ann. § 15-801(10) (Supp. 1953).

⁶⁰ Pa. Stat. Ann. tit. 15, §§ 653-54 (Supp. 1953).

⁶¹ With respect to pensions and allowances, the statute authorizes retroactive pensions and allowances to be granted to officers, directors and employees for "faithful and long-continued services." Such allowances may be made to dependents after the death of the director, officer or employee, except that such payments to dependents cannot exceed in toto the compensation earned by the deceased in his last twelve months with the corporation unless such payments are made pursuant to an employee-benefit plan or employment contract in force at the time of death or retirement. This part of the statute is probably designed to dispel doubts created by general language in *Moore v. Keystone Macaroni Mfg. Co.*, 370 Pa. 172, 87 A.2d 295 (1952), 1952 Annual Surv. Am. L. 415, 28 N.Y.U.L. Rev. 478 (1953); 101 U. of Pa. L. Rev. 153 (1952). While the specific pension in that case would still be invalid under the present

Effect of Adverse Interest.—The only new court decision on this subject is an affirmance of a case noted here last year.⁶² By it, the Supreme Court of Delaware has held valid a corporate bylaw permitting interested directors to vote despite the lack of statutory authorization and despite the fact that such directors cannot vote at common law. While recognizing that the Delaware statutory provision against bylaws or charter provisions that contravene the law includes common law, the court said the common-law prohibition of voting by interested directors is not such a matter of public policy that it cannot be altered by contract among the shareholders.⁶³

Fiduciary Duties.—Many of the cases collected under this heading offer no new developments of general importance. One we have discussed elsewhere.⁶⁴ In another a federal court of appeals affirmed the action of the trial court in absolving of liability a common directorate accused of diverting profits from subsidiary to parent.⁶⁵ The profits were derived from the sale by the parent of an oxygen-producing breathing device, developed from research and patents of an engineer who prior to 1935 was employed by the subsidiary. From 1935 to 1940 this employee's time was divided between the two corporations, as was his salary. It was during this period that his patents were secured and assigned to the parent. Plaintiff, a minority shareholder in the subsidiary, alleged a breach of duty by the common directors on the ground that the device properly belonged to the subsidiary under the employee's covenant to assign. In sustaining the trial court's finding of good faith, the court of appeals stressed the different and limited purpose of the subsidiary, and its financial weakness and inability to pay all of the employee's salary. The decision appears quite sound.

Duties to Individual Shareholders.—Plaintiff, a corporate executor, alleged actual and constructive fraud in the inducement of its sale of shares owned by the estate to defendant corporation through the defendant director and largest stockholder. The constructive fraud theory lies in the breach of fiduciary obligation owed the individual shareholder by the director. The alleged breach was the

statute, the language of the opinion had cast doubt on the validity of even reasonable discretionary payments to dependents.

⁶² *Sterling v. Mayflower Hotel Corp.*, 89 A.2d 862 (Del. Ch. 1952), noted in 1952 Annual Surv. Am. L. 415, 28 N.Y.U.L. Rev. 478 (1953).

⁶³ *Sterling v. Mayflower Hotel Corp.*, 93 A.2d 107 (Del. 1952). See Notes, 51 Mich. L. Rev. 705 (1953), 14 U. of Pitt. L. Rev. 590 (1953).

⁶⁴ *Duane Jones Co. v. Burke*, 281 App. Div. 622, 121 N.Y.S.2d 107 (1st Dep't 1953), aff'd, 306 N.Y. 172, 117 N.E.2d 237 (1954), criticized in 1953 Survey of New York Law, 28 N.Y.U.L. Rev. 1437.

⁶⁵ *Hirshhorn v. Mine Safety Appliances Co.*, 203 F.2d 279 (3d Cir. 1953), affirming 106 F. Supp. 594 (W.D. Pa. 1952).

failure to reveal secret negotiations which, within a short time, led to a most profitable purchase of an interest in a theater. Damages would be the resultant appreciation in the value of plaintiff's stock. This theory was held sufficient by an Illinois court.⁶⁶ The case presents the troublesome problem of the standards to be imposed upon directors in their dealings with individual shareholders. This court, like some others,⁶⁷ distinguishes between dealings for the director and those for the corporation. It purports to adopt the "special facts" concept enunciated by the United States Supreme Court.⁶⁸ One reviewer has argued that the concept does not fit these facts, given the professional, nontrusting character of this plaintiff.⁶⁹ Nevertheless, a salient fact makes the decision appealing. The corporation involved had a small number of shares, very closely held. The three stockholders had agreed to hold their interests as partners and not to buy into any theater without the consent of the others. A fiduciary duty under these circumstances would seem clear.

Indemnification of Fiduciaries.—The New York Court of Appeals has affirmed one of the "antitrust morality" cases, tried in 1951 and noted here then and on appeal.⁷⁰ On this perplexing problem the trial and intermediate courts went no further than to hold that a director's violation of antitrust laws is an automatic breach of his duty to the corporation, with a resultant disqualification for statutory reimbursement for litigation expenses.⁷¹ That was indeed far enough. Now by a four-to-three vote the statutory right to reimbursement is limited to civil actions, so that a director accused of committing a statutory economic crime in the performance of his normal functions as a corporate official, may not recover his litigation expenses even if he is fully exonerated. A powerful dissent written by Judge Fuld argues convincingly that the Legislature intended the statute to apply to such criminal proceedings and spells out the public policy considerations involved.⁷² Wise draftsmen will amend charters and bylaws to fill gaps opened by this case.⁷³

⁶⁶ Northern Trust Co. v. Essaness Theatres Corp., 348 Ill. App. 134, 108 N.E.2d 493 (1952). Another phase of this litigation is discussed in 1952 Annual Surv. Am. L. 421-22, 28 N.Y.U.L. Rev. 484-85 (1953).

⁶⁷ See Dodd & Baker, Cases and Materials on Corporations 54 et seq. (2d ed. 1951).

⁶⁸ Strong v. Repide, 213 U.S. 419 (1909).

⁶⁹ [1953] U. of Ill. L. Forum 144.

⁷⁰ Schwarz v. General Aniline & Film Corp., 305 N.Y. 395, 113 N.E.2d 533 (1953), affirming 279 App. Div. 996, 112 N.Y.S.2d 146 (1st Dep't 1952), affirming 198 Misc. 1046, 102 N.Y.S.2d 325 (Sup. Ct. 1951). See 1952 Annual Surv. Am. L. 412, 28 N.Y.U.L. Rev. 475 (1953); 1951 Annual Surv. Am. L. 478.

⁷¹ N.Y. Gen. Corp. Law §§ 64-68.

⁷² Schwarz v. General Aniline & Film Corp., 305 N.Y. 395, 407, 113 N.E.2d 533, 538 (1953).

⁷³ See Abrons, Indemnification of Corporate Officers and Directors for Expense Incurred in Litigation, 130 N.Y.L.J. 1046, col. 1 (Nov. 19, 1953).

The Delaware indemnification statute⁷⁴ has received its first construction in a case brought in the federal courts. When a former director sought to recover expenses incurred in preparing a defense to a derivative action in which he was included as a defendant, the corporation defended on the theory that indemnification was limited to directors who participated in the acts alleged to be wrongful. Since plaintiff in the instant case had not participated in the acts in question, he would not be entitled to reimbursement for his defense. The court refused, quite properly, to so restrict the statute.⁷⁵ As another facet of the same case, the court held that neither the statute nor the bylaws set out exclusive grounds for indemnification. In consideration of plaintiff's cancellation of his contract as president, the corporation contracted to pay for his litigation expenses in actions then pending. The court found the contract valid and within the powers of the corporation, apart from statutory, bylaw or charter authorization.

III

STOCK AND STOCKHOLDERS

Issue of Shares.—Statutory requirements regarding the kinds of consideration for which stock may be issued have been strictly enforced in three recent cases and given a broad interpretation in a fourth. In California, a permit from the Commissioner of Corporations is a prerequisite to the issue of shares.⁷⁶ Where such permit authorized a corporation to issue shares for cash, the California court invalidated shares issued to a principal stockholder for the cancellation of a debt⁷⁷ and nullified a corporate election at which such shares were voted, even though the corporation would have been entitled to obtain an amendment to its permit to authorize the issue of shares for that consideration.⁷⁸ In Ohio, an election of directors was upset when the court ruled that shares issued for a conditional promissory note violated an express prohibition of the Ohio statute.⁷⁹ Interestingly enough, the court voided the shares on its own motion, disregarding an express stipulation by the parties which conceded the

⁷⁴ Del. Code Ann. tit. 8, c. 1, § 122(10) (1953).

⁷⁵ *Mooney v. Willys-Overland Motors, Inc.*, 204 F.2d 888 (3d Cir. 1953), affirming 106 F. Supp. 253 (D. Del. 1952).

⁷⁶ Cal. Corp. Code Ann. § 26100 (Deering 1952).

⁷⁷ Cal. Corp. Code Ann. § 1109(d) (Deering 1952) authorizes the issue of shares for, inter alia, the cancellation of a debt.

⁷⁸ *Reed v. Norman*, 256 P.2d 930 (Cal. 1953). Although the court was not entirely convinced that the evidence established cancellation of a debt as the consideration for the issue, it ruled that the same result would follow even if that fact were proved.

⁷⁹ Ohio Gen. Code Ann. § 8623-22 (Supp. 1952) provides: "Promissory notes, drafts, or other obligations of a subscriber or purchaser, shall not be accepted as payment for shares."

validity of the shares.⁸⁰ Mississippi's statute forbidding the issue of a stock for "[a] note, obligation, or security of any kind given or transferred by any subscriber"⁸¹ has been construed by a federal court as covering an issue where the subscribers gave their notes to a finance company which delivered its own notes to the corporation.⁸² The wording of the statute is too broad to permit distinguishing, as property, third party obligations of any type.

In contrast to these decisions, the fourth case advances an unusually broad interpretation of the term "property" as used in the New York statute requiring that the consideration for shares be "money, labor done or property actually received."⁸³ A corporation organized to do business as an advisory consultant in the fields of management, labor relations, finance, etc., had issued varying amounts of five-dollar par stock to "key" individuals who left lucrative and established positions in these fields to enter into employment contracts with the new company. The recipients paid no money for the shares which were issued under a directors' resolution stating that the purpose of the transfer was "to compensate [the recipient] for the risk you undergo in undertaking this employment. . . ." Dismissing a suit by the trustee in bankruptcy for the unpaid par value of the stock so issued, the court upheld the validity of the consideration.⁸⁴ The court acknowledged that an executory contract to perform future services would ordinarily be invalid consideration under the statute,⁸⁵ but argued that here the services of the recipients should be deemed "property" because (1) the skill and reputation of its employees are the principal "assets" of a corporation which deals in services rather than in tangible goods, and (2) the acquisition by such a corporation of skilled personnel with established reputations in their fields is tantamount to the acquisition of "good will." There could be little quarrel with this reasoning if the shares had actually been issued in consideration of the clients, business or accounts which the recipients may have brought with them,⁸⁶ but on the facts of this case, the court's attempt to distinguish the "future services" precedents is unpersuasive.

⁸⁰ *State v. Stookey*, 113 N.E.2d 254 (Ohio App. 1953).

⁸¹ Miss. Code Ann. § 5327 (1942).

⁸² *Graves, Inc. v. Commissioner*, 202 F.2d 286 (5th Cir. 1953). Accordingly, the shares in question could not be included in the invested-capital base for computation of the excess profits tax.

⁸³ N.Y. Stock Corp. Law § 69.

⁸⁴ *Brown v. Watson*, 124 N.Y.S.2d 504 (Sup. Ct. 1953).

⁸⁵ Under a long line of New York precedents. See, e.g., *Palmer v. Shefiel*, 183 App. Div. 77, 170 N.Y. Supp. 588 (1st Dep't 1918), *aff'd*, 236 N.Y. 511, 142 N.E. 263 (1923).

⁸⁶ The good will of a business has been held to be "property" and therefore valid consideration for the issue of shares under the New York statute. See *Washburn v. National Wall-Paper Co.*, 81 Fed. 17 (2d Cir. 1897). It would not seem too far-fetched to extend this principle, with appropriate safeguards as to valuation, to the

Reacquisition of Shares.—On analogy to the pre-emptive right, all but one of the few courts which have considered the problem have required a corporation's purchases of its own shares for retirement and capital reduction to be made on a pro-rata basis from those stockholders willing to sell.⁸⁷ However, a recent decision by the Supreme Court of Delaware holds that a corporation has the power, under the Delaware statute authorizing voluntary capital reductions,⁸⁸ to purchase shares for retirement at a private sale without a pro-rata offering to the other shareholders.⁸⁹ Accordingly, the court dismissed a minority shareholder's suit to enjoin the corporation's private purchase of a large block of shares held by a stockholder who was at odds with management policy.⁹⁰ The business justification of the purchase was to eliminate managerial representation of a competitor and to prevent the dumping of the stock on the market. The decision is eminently sound as a matter of statutory construction; its logic on the broader aspects of the problem is persuasive. It seems to us as reviewers that the desirability of the pro-rata requirement has been assumed without sufficient consideration. Its supposed rationale is on the whole equally applicable to treasury stock purchases, and yet the cases uniformly distinguish the two situations; in complicated capital structures the application of the pro-rata principle may become as impossible as the

business brought to a "service" corporation by a key employee who gives up a previous position and brings his clients with him.

⁸⁷ See, e.g., *Currier v. State Co.*, 56 N.H. 262 (1875); *Berger v. United States Steel Corp.*, 63 N.J. Eq. 809, 53 Atl. 68 (Err. & App. 1902); *General Investment Co. v. American Hide & Leather Co.*, 98 N.J. Eq. 326, 129 Atl. 244 (Err. & App. 1925). Contra: *Security Nat. Bank v. Crystal Ice & Fuel Co.*, 145 Kan. 899, 67 P.2d 527 (1937). Following the early New Jersey decisions, the requirement of a pro-rata offer to purchase has been codified in New Jersey, N.J. Stat. Ann. tit. 14, c. 11, § 5(f) (1939), and in Virginia. Va. Code tit. 13, § 92(1)(e) (1950). The cases applying the rule invariably except purchasers of shares for reissue (treasury stock). See *Berger v. United States Steel Corp.*, supra.

⁸⁸ Del. Code Ann. tit. 8, § 244 (1953), amended by Del. Laws 1953, c. 220.

⁸⁹ *Martin v. American Potash and Chemical Corp.*, 92 A.2d 295 (Del. 1952), 41 Geo. L.J. 255 (1953), 39 Va. L. Rev. 375 (1953).

⁹⁰ The court's construction of the statute seems inevitable, since the statute is unusually specific in authorizing a corporation to reduce capital by purchasing shares for retirement "either pro rata from holders of shares of that class of stock or by purchasing such shares from time to time in the open market or at private sale. . . ." (Emphasis supplied.) Del. Code Ann. tit. 8, § 244(b) (Supp. 1954). Statutes similar to Delaware's are found in only six other jurisdictions, Colorado, Kansas, Maine, Nebraska, Nevada and West Virginia. Of the remaining jurisdictions, the majority have statutes which set out no specific methods for effecting reductions of capital, while a few provide for only compulsory methods and a few others provide for voluntary methods but only in general terms. See 41 Geo. L.J. 255 (1953) for a helpful collation and classification of the statutes. See also 39 Va. L. Rev. 375 (1953). Each of these conveys the impression that the weight of authority is on the side of requiring a pro-rata offering in the purchase of shares for retirement where the statute is silent on the point. But cf. Ballantine, *Corporations* 632 (Rev. ed. 1946).

pre-emptive right. Furthermore, the fear of such abuses as consolidation of managerial control with corporate funds, bail-out of insiders from unprofitable undertakings, dilution of the interest of the remaining shareholders through the payment of excessive prices for shares to be retired, etc., has been overstated. These abuses can be discouraged or remedied by the traditional enforcement of the fiduciary obligations of management and majority shareholders, without the imposition of new and cumbersome burdens.

A corporation's purchase of its own shares is, in effect, a distribution to shareholders of corporate assets, and for this reason most jurisdictions have provided at least minimal protection for creditors by imposing some sort of restrictions on the reacquisition of shares.⁹¹ Rhode Island's statute, which prohibits a corporation's purchase of its own shares if the corporation's capital is impaired at the time of purchase or would become impaired as a result of the purchase,⁹² has been applied in a recent bankruptcy proceeding to bar the claim of a former shareholder based on a promissory note given by the corporation in payment for the petitioner's shares. Although it did not appear that the corporation was insolvent in either the bankruptcy or equity sense at the time of the repurchase agreement, the court held the note void and unenforceable since it did appear that the repurchase agreement was made at a time when the purchase of petitioner's shares would cause an impairment of capital.⁹³

*Dividends.*⁹⁴—In dividend law this year, the only significant case was the decision by a New York trial court in *Wouk v. Mering*⁹⁵ on the right of cumulative preferred stock to receive accrued, undeclared dividends at the time of corporate dissolution or liquidation.⁹⁶ In

⁹¹ For a critical analysis of one of the most recent and detailed enactments see Nemmers, *The Treasury Stock Sections of the Wisconsin Business Corporations Law*, [1953] Wis. L. Rev. 480.

⁹² R.I. Gen. Laws c. 116, § 5(g) (1938).

⁹³ *In re Semolina Macaroni Co.*, 109 F. Supp. 453 (D.R.I. 1952). The court ruled that the corporation's solvency at the time of repurchase was irrelevant in this action, since it was an attempt to enforce an illegal claim against a bankrupt. But where the trustee in bankruptcy seeks to recover the purchase price from the shareholder, the corporation's solvency at the time of repurchase may be an important element. See Ballantine, *Corporations* 621-24.

⁹⁴ On the problem of legal sources for dividend and other distributions see Rudolph, *The Capital Margin Concept and the Wyoming Corporation Law*, 7 Wyo. L.J. 117 (1953); Seward, *Sources of Distributions to Stockholders*, 5 Baylor L. Rev. 242 (1953); Note, *Unrealized Appreciation and Corporate Dividends*, 2 Drake L. Rev. 14 (1952). For a critical analysis of the Wisconsin Business Corporation Law's provisions on liability for illegal dividends, see Note, *Dual Liability for Illegal Dividends under the New Corporation Code?*, [1953] Wis. L. Rev. 380.

⁹⁵ 203 Misc. 912, 120 N.Y.S.2d 546 (Sup. Ct. 1953).

⁹⁶ For an excellent and comprehensive analysis of the confusion on this problem see Note, *Preferred Stockholders' Rights, upon Liquidation or Dissolution, to Dividends*, 25 A.L.R.2d 788 (1952). See also 1951 Annual Surv. Am. L. 470.

construing the preferred stock contract to give priority to such stock over the return of capital to the common, regardless of the existence of past earnings or present surplus, the court properly reasoned that there was no legal impediment by virtue of the capital-impairment statute.⁹⁷ It is regrettable that the opinion made no reference to an early New York decision which has long been regarded as the leading authority for the proposition that the return of capital to junior shares takes precedence on dissolution over the payment of "unearned" and undeclared cumulative dividends.⁹⁸ However, the earlier case is readily distinguishable on its facts,⁹⁹ and its broader implications have been repudiated by the weight of modern authority.¹⁰⁰

Fundamental Corporate Changes.—The plan of merger whereby the Mayflower Hotel Corporation was absorbed by the parent Hilton Hotels Corporation has been reviewed recently by the Supreme Court of Delaware in a decision which holds the plan to be fair to the minority stockholders of Mayflower.¹⁰¹ The principal question before the court was whether the conversion of Mayflower stock into Hilton stock on a share-for-share basis was fair in view of the fact that Mayflower's assets were valued at more than \$10,000,000 while the total market value of the Hilton stock received in exchange for the Mayflower stock was less than \$6,000,000. The one-to-one conversion ratio had been set by a securities analyst on the basis of the comparative investment values of the two stocks at the time of merger. Minority shareholders of Mayflower claimed they were entitled to receive the full liquidation value of Mayflower's assets, *i.e.*, Hilton stock with a market value equal to the liquidation value of the Mayflower stock, on the theory that the merger should be treated as equivalent to the sale of corporate assets for stock in another corporation.¹⁰² The Delaware court disagreed: Since a merger contemplates the continuation of the merged corporation as part of a going concern, the test of fairness is not whether the minority share-

⁹⁷ *E.g.*, N.Y. Stock Corp. Law § 58.

⁹⁸ *Michael v. Cayey-Caguas Tobacco Co.*, 190 App. Div. 618, 180 N.Y. Supp. 532 (1st Dep't 1920).

⁹⁹ See Note, Preferred Stockholders' Rights, upon Liquidation or Dissolution, to Dividends, 25 A.L.R. 2d 788, 812 (1952).

¹⁰⁰ *Id.* at 797-801. See also Stevens, Corporations 471-73 (1949).

¹⁰¹ *Sterling v. Mayflower Hotel Corp.*, 93 A.2d 107 (Del. 1952), 39 Va. L. Rev. 242 (1953). The decision affirms 89 A.2d 862 (Del. Ch. 1952), 1952 Annual Surv. Am. L. 415, 28 N.Y.U.L. Rev. 478 (1953). In addition to the principal holding, the decision sustains the validity of a charter provision which permits interested directors to be counted in determining the existence of a quorum. The court's theory was that such a provision does not violate public policy even though it contravenes the common-law rule in Delaware on interested directors.

¹⁰² See *Allied Chemical & Dye Corp. v. Steel & Tube Co.*, 14 Del. Ch. 1, 120 Atl. 486 (Ch. 1923).

holders of the subsidiary receive the liquidation value of their stock, but rather, whether they receive the substantial equivalent in value of what they had before.¹⁰³

Availability of the Appraisal Remedy.—Two cases this year deal with the question of whether the appraisal remedy is available to shareholders who acquire their shares during the late stages of the corporate action which gives rise to the appraisal right. The first case denied the remedy to a person who had acquired shares in a national bank as a speculation, after learning that the directors had approved a plan for consolidation.¹⁰⁴ Despite the absolute language of the federal statute governing consolidation of national banks, to the effect that "any shareholder . . . who dissents from the plan of consolidation" is entitled to receive the value of the shares held by him,¹⁰⁵ a majority of the court thought that the right is limited to bona fide dissenters and is not available where, as here, the "dissenter" wished the consolidation to take place in order for his speculation to succeed. One judge concurred on the ground that *all* purchasers who acquire their shares after the announcement of a consolidation should be denied an appraisal. In the second case, the Supreme Judicial Court of Massachusetts held that appraisal was not available to one who had acquired his shares after the date validly fixed by the directors for determining the shareholders entitled to vote on the consolidation plan.¹⁰⁶

Two other decisions, both by the New York Appellate Division, involve the problem of whether a particular corporate action gives rise to an appraisal right under the applicable New York statutes.¹⁰⁷ In a third case in the same state the Court of Appeals has sustained

¹⁰³ The same rule for evaluation has been applied by the SEC in mergers under the Public Utility Holding Company Act. See *Alabama Power Co.*, SEC Holding Co. Act Release No. 11548 at 6 (Oct. 21, 1952). However, it is questionable whether the Delaware court's apparent distinction between a sale of assets and a merger is sufficiently realistic to warrant different rules of valuation in all instances. See Note, 39 Va. L. Rev. 242, 244 (1953).

¹⁰⁴ *Central-Penn Nat. Bank v. Portner*, 201 F.2d 607 (3d Cir. 1953), 66 Harv. L. Rev. 1528. An amendment to the N.Y. Banking Law permits payment only on shares purchased prior to the stockholders' approval. N.Y. Laws 1953, c. 587.

¹⁰⁵ 40 Stat. 1043 (1918), as amended, 12 U.S.C. § 33 (1946).

¹⁰⁶ *Booma v. Bigelow-Sanford Carpet Co.*, 111 N.E.2d 742 (Mass. 1953), construing Mass. Ann. Laws c. 156, § 46B (1948), added by Mass. Laws 1941, c. 514, § 2. See Mass. Laws 1953, c. 185, permitting directors to fix a record date for dissents. See also Kan. Laws 1953, c. 132.

¹⁰⁷ *Brill v. Blakely*, 281 App. Div. 532, 120 N.Y.S.2d 713 (1st Dep't 1953); *Kunin v. Title Guarantee & Trust Co.*, 281 App. Div. 635, 121 N.Y.S.2d 220 (1st Dep't 1953), reversing *In re Schutte*, 114 N.Y.S.2d 162 (Sup. Ct. 1952), criticized in 1952 Annual Surv. Am. L. 402-03, 28 N.Y.U.L. Rev. 465-66 (1953). See Note, *Necessity for Stockholder Consent to Sale of Corporate Assets*, 28 N.Y.U.L. Rev. 1014 (1953). See also 1953 Survey of New York Law, 28 N.Y.U.L. Rev. 1436 (1953).

the right of a minority to enjoin a transfer of all corporate assets authorized by two-thirds of the outstanding shares, in apparent conformity with statute.¹⁰⁸ The decision is important in its holding that the appraisal remedy is not exclusive where the majority is clearly over-reaching the minority in attempting a scheme designed to deprive the latter of voting rights and the power of disposition.¹⁰⁹

*Appraisal Proceedings.*¹¹⁰—In prior years, the New York courts have indicated a trend to appraise the "value" of stock largely in terms of the market value;¹¹¹ this year an intermediate court of that state qualified this trend by reviving investment value and net asset value as elements also to be considered.¹¹² The case concerned stock which had been traded only on over-the-counter markets. The court said that market value was still the controlling consideration where the stock is traded on a recognized exchange in a volume and under free and open conditions which make the market prices fair reflections of the judgment of the buying and selling public. But it may not be assumed that the market prices of shares traded on over-the-counter markets have a similar reliability. In its first decision on the problem of value in appraisal proceedings, the Supreme Court of Washington has delivered a lengthy opinion on valuation principles in which it reduced the appraiser's award on the principal ground that it substantially overvalued intangible assets.¹¹³ On application of the valuation principles announced several years ago by the Delaware Supreme Court,¹¹⁴ the Delaware Chancellor modified an appraiser's award which gave too much weight to the asset value of the stock of a going concern.¹¹⁵

Dissolution.—A current decision involves the interesting question of whether criminal proceedings against a corporation abate upon its

¹⁰⁸ *Eisenberg v. Central Zone Property Corp.*, 306 N.Y. 58, 115 N.E.2d 652 (1953), reversing 281 App. Div. 817, 118 N.Y.S.2d 919 (1st Dep't 1953), which in turn had reversed 203 Misc. 59, 116 N.Y.S.2d 154 (Sup. Ct. 1952). The supreme court decision was noted in 66 Harv. L. Rev. 746 (1953).

¹⁰⁹ See 1953 Survey of New York Law, 28 N.Y.U.L. Rev. 1436; Note, 66 Harv. L. Rev. 746 (1953); 1952 Annual Surv. Am. L. 402, 28 N.Y.U.L. Rev. 465 (1953); 1950 Annual Surv. Am. L. 454.

¹¹⁰ For an excellent summary and comparison of the various appraisal statutes see Note, *Appraisal Statutes—An Analysis of Modern Trends*, 38 Va. L. Rev. 915 (1952).

¹¹¹ See Note, 28 N.Y.U.L. Rev. 1021 (1953). For a general discussion of valuation standards see Comment, 51 Mich. L. Rev. 713 (1953).

¹¹² *Application of Silverman*, 282 App. Div. 252, 122 N.Y.S.2d 312 (1st Dep't 1953), reversing 115 N.Y.S.2d 97 (Sup. Ct. 1952), 1952 Annual Surv. Am. L. 403-04, 28 N.Y.U.L. Rev. 466-67 (1953).

¹¹³ *Petition of Northwest Greyhound Lines*, 41 Wash.2d 672, 251 P.2d 607 (1952).

¹¹⁴ *Tri-Continental Corp. v. Battye*, 31 Del. Ch. 523, 74 A.2d 71 (Ch. 1950), 1950 Annual Surv. Am. L. 454.

¹¹⁵ *Heller v. Munsingwear*, 98 A.2d 774 (Del. Ch. 1953).

dissolution.¹¹⁶ In an antitrust prosecution against a Delaware corporation whose existence was terminated pursuant to a bona fide merger eight months after the indictment, the Court of Appeals for the Sixth Circuit held that the corporation was entitled to have the proceeding against it abated, on the ground that there is no authority in the applicable Delaware statutes for the prosecution or continuance of a criminal action against a dissolved corporation.¹¹⁷ The statutory provision continuing corporate existence for three years after dissolution for the purpose, among others, of prosecuting or defending "suits" and the provision saving "any action, suit, or proceeding" commenced by or against the corporation before dissolution¹¹⁸ were interpreted to refer only to civil actions or proceedings.¹¹⁹

Although there is no statutory authority in New York for the winding-up or dissolution of a corporation at the suit of a minority shareholder,¹²⁰ New York courts have recognized an inherent judicial power, apart from statute, to grant such relief under appropriate circumstances.¹²¹ This year, the New York Appellate Division has held one of the essential conditions to be a showing of abuse and breach of duty on the part of the majority; allegations of misconduct and mismanagement on the part of directors alone are not sufficient.¹²²

IV

SECURITIES REGULATION

Exempt Transactions in Securities.—For the first time in twenty years of Securities Act litigation, the Supreme Court has construed the so-called "private offering" exemption of Section 4(1).¹²³ The decision is of particular importance because of its bearing upon the scope and method of stock offerings to employees if the delay and expense of registration is to be avoided. The Supreme Court agreed

¹¹⁶ See Ballantine, Corporations 731.

¹¹⁷ United States v. Line Material Co., 202 F.2d 929 (6th Cir. 1953).

¹¹⁸ Del. Code Ann. tit. 8, §§ 261, 278 (1953).

¹¹⁹ The construction was on the authority of United States v. Safeway Stores, 140 F.2d 834 (10th Cir. 1944); United States v. Borden, 28 F. Supp. 177 (N.D. Ill. 1939). These cases have been severely criticized. See Marcus, Suability of Dissolved Corporations, 58 Harv. L. Rev. 675, 686 (1945).

¹²⁰ Statutes in a large number of states expressly grant and regulate such authority. See Ballantine, Corporations 715.

¹²¹ See Lennan v. Blakcley, 273 App. Div. 767, 75 N.Y.S.2d 331 (1st Dep't 1947), 1947 Survey of New York Law, 23 N.Y.U.L.Q. Rev. 750 (1948); Kroger v. Jaburg, 231 App. Div. 641, 248 N.Y. Supp. 387 (1st Dep't 1931).

¹²² Fonthelm v. Walker, 282 App. Div. 373, 122 N.Y.S.2d 642 (1st Dep't 1953), reversing 121 N.Y.S.2d 424 (Sup. Ct. 1953).

¹²³ SEC v. Ralston Purina Co., 346 U.S. 119 (1953), 21 U. of Chi. L. Rev. 113, construing the second clause of Section 4(1), 48 Stat. 77 (1933), as amended, 48 Stat. 906 (1934), 15 U.S.C. § 77(d)(1) (1946).

with the district¹²⁴ and circuit¹²⁵ courts that a private offering (exempt from registration requirements) may be made to a large number of persons;¹²⁶ and that the controlling factor is the knowledge of the offerees about the issuer's business.¹²⁷ Both of the lower courts, however, had thought that such knowledge might be implied from the careful selection of "key employees" marked for promotion in the various echelons of the company's organization, even though the list included trainees, clerks, stenographers, electricians, bakeshop foremen and others in subordinate positions, as well as executives and managers.¹²⁸ The Supreme Court disagreed: The issuer must affirmatively show that the employees, as investors, do not need the protection of the Act because they have access to the kind of information about the stock which registration would disclose. The decision is susceptible of two constructions: (1) that a private offering can be made only to employees holding top management jobs which in regular course make available the necessary investment data;¹²⁹ or (2) that a wider offering to selected employees may be private if accompanied by adequate though informal disclosure of the pertinent information. It would seem that the broader interpretation is preferable as a practical matter; but the point is by no means clear.¹³⁰

Another major class of unregistered offerings results from Section 3(6) of the Securities Act, which authorizes the Commission to exempt transactions not exceeding \$300,000 in offering price.¹³¹ The rules governing this exemption (Regulation A) have this year been completely revised. The most important change requires a detailed "offering circular" in cases involving offerings of \$50,000 or more.¹³²

¹²⁴ SEC v. Ralston Purina Co., 102 F. Supp. 964 (E.D. Mo. 1952), noted in 1952 Annual Surv. Am. L. 421, 28 N.Y.U.L. Rev. 484 (1953); 21 Ford. L. Rev. 183 (1952); 51 Mich. L. Rev. 597 (1953).

¹²⁵ SEC v. Ralston Purina Co., 200 F.2d 85 (8th Cir. 1952), 66 Harv. L. Rev. 1144 (1953), 39 Va. L. Rev. 376 (1953).

¹²⁶ This overrules the SEC's long-standing position that an offering to twenty-five or more persons by itself constitutes a public offering, but the Commission remains free to apply a numerical test to determine whether or not a particular claim for exemption should be investigated.

¹²⁷ See Loss, Securities Regulation 396 (1951).

¹²⁸ Purportedly on the authority of SEC v. Sunbeam Gold Mines Co., 95 F.2d 699 (9th Cir. 1938), which is easily distinguishable.

¹²⁹ See 8 Record, Ass'n of Bar of City of N.Y. 371 (1953).

¹³⁰ The principal decision would seem to have no effect on distributions of stock to employees as bonuses.

¹³¹ The par value is immaterial. *Mines & Metals Corp. v. SEC*, 200 F.2d 317 (9th Cir. 1952), cert. denied, 345 U.S. 941 (1953). The case also holds that the Commission's subpoena power does not depend on a prior affirmative showing of probable violation of the Act.

¹³² 2 CCH Fed. Sec. Law Rep. ¶ 4225 (1954). *SEC v. Searchlight Consol. Mining & Milling Co.*, 112 F. Supp. 726 (D. Nev. 1953) holds on established principles that

*Fraud on Purchaser or Seller.*¹³³—The well-settled view that Section 10(b) of the Securities Exchange Act¹³⁴ and its implementing Rule X-10B-5 apply to even the most private purchases or sales of securities, provided there is use of the mails or other facilities of interstate commerce,¹³⁵ has been further strengthened by the reversal of the lone unreported decision to the contrary.¹³⁶ Since that section reaches all fraudulent acts "in connection with" such transactions, there is usually little difficulty in sustaining federal jurisdiction.

The problem of jurisdiction is more complicated under Section 12(2)¹³⁷ which imposes liability for damages or rescission upon a seller. The text of the section refers to "the use of" interstate facilities for the sale "by means of a prospectus or oral communication, which includes an untrue statement. . . ." The seventh circuit has taken the narrow view that the fraud itself must be committed through the use of interstate commerce facilities;¹³⁸ but the second circuit thinks it is enough that a fraudulent transaction has been completed by delivery of the securities through the mails.¹³⁹ The fifth circuit has now followed the broader approach, and this decision is now before the Supreme Court for review, so that the conflict on this question may be resolved during 1954.¹⁴⁰

A decision noted here in 1951¹⁴¹ has been affirmed by the second circuit in a brief per curiam opinion (Judge Frank dissenting).¹⁴²

the right to sell stock pursuant to Regulation A is lost by failure to comply with the rule requiring prior filing of certain literature used in connection with the offering.

¹³³ Professor Latty has written an excellent review of the applicability of the Securities Act and the Securities Exchange Act to fraud situations in close corporations. Latty, *The Aggrieved Buyer or Seller or Holder of Shares in a Close Corporation under the S.E.C. Statutes*, 18 *Law & Contemp. Prob.* 505 (1953).

¹³⁴ 48 Stat. 891 (1934), 15 U.S.C. § 78j(b) (1946).

¹³⁵ See Loss, *Securities Regulation* 840 et seq. (1951).

¹³⁶ *Fratt v. Robinson*, 203 F.2d 627 (9th Cir. 1953), reversing *Fratt v. Robinson*, W.D. Wash., 1951, Civ. No. 2765, Aug. 6, 1951, noted in Loss, *Securities Regulation* 841 n.103 (1951), and 1951 *Annual Surv. Am. L.* 483 n.168. Incidentally the court of appeals preferred the ordinary financial-district meaning of "over the counter market" (one involving professional dealers) to the trial court's view, which has some support, that the term was intended to include all transactions effected "otherwise than on a national securities exchange." See Loss, *op. cit. supra* at 709. However, this holding is dictum because it had no bearing on the result.

¹³⁷ 48 Stat. 84 (1933), 15 U.S.C. § 77(l)(2) (1946).

¹³⁸ *Kemper v. Lohnes*, 173 F.2d 44 (7th Cir. 1949).

¹³⁹ *Schillner v. H. Vaughan Clarke & Co.*, 134 F.2d 875 (2d Cir. 1943).

¹⁴⁰ *Blackwell v. Bentsen*, 203 F.2d 690 (5th Cir.), cert. granted, 346 U.S. 908 (1953). For a discussion of the conflict, see Loss, *Securities Regulation* 1001-3 (1951).

¹⁴¹ *Joseph v. Farnsworth Radio & Television Corp.*, 99 F. Supp. 701 (S.D.N.Y. 1951), noted in 1951 *Annual Surv. Am. L.* 483. The case has been strongly criticized. 4 *Stan. L. Rev.* 308 (1952).

¹⁴² *Joseph v. Farnsworth Radio & Television Corp.*, 198 F.2d 883 (2d Cir. 1952).

Section 10(b) was held not to apply to a misrepresentation by one who was neither a buyer nor a seller.¹⁴³

Nonwaiver Provision.—Only two years ago the leading writer on the subject observed: "Apart from the one Florida case [not a square holding], the anti-waiver provisions have apparently never figured in any litigation either in this country or in England."¹⁴⁴ He was referring to Section 14 of the Securities Act¹⁴⁵ and its British counterpart,¹⁴⁶ which nullify any stipulation binding the buyer of a security to waive compliance with the statute or its implementing rules and regulations. Early in 1951, however, a buyer acquired through a broker certain shares under a margin contract providing for a blanket submission to arbitration of any controversy between the parties. Two weeks later the original buyer sold the shares at a loss, and thereafter brought an action under Section 12(2) against the broker for reimbursement on the ground of misrepresentation. The defendant moved for a stay under the Federal Arbitration Act,¹⁴⁷ failed in the trial court and succeeded in the second circuit.¹⁴⁸ Now the issue has been decided in favor of the buyer by a divided Supreme Court.¹⁴⁹

In the majority opinion, Mr. Justice Reed could not reconcile the conflict in congressional policy between the nonwaiver provisions and the arbitration statute, and concluded that the special advantages given to the buyer under the Securities Act must take precedence. Mr. Justice Jackson concurred in invalidating the arbitration clause agreed to in advance of the controversy, but properly thought the parties should remain free to arbitrate after the controversy had arisen. Justices Frankfurter and Minton dissented on the theory that the two statutes could be reconciled through judicial review of the arbitrators' decision, but the logic of the majority's contrary position on this point seems superior.

What Constitutes a Security.—Section 2(1) of the Securities Act defines "security" to include, besides the more familiar types, an "investment contract" or "any interest or instrument commonly known as a 'security.'"¹⁵⁰ Following the reasoning of the two major

¹⁴³ See *Birnbaum v. Newport Steel Corp.*, 193 F.2d 461, 464 (2d Cir.), cert. denied, 343 U.S. 956 (1952); 1952 Annual Surv. Am. L. 421 n.211, 28 N.Y.U.L. Rev. 484 n.211 (1953); Latty, op. cit. supra note 11, at 521, 527.

¹⁴⁴ Loss, Securities Regulation 1076 (1951).

¹⁴⁵ 48 Stat. 84 (1938), 15 U.S.C. § 77n (1946).

¹⁴⁶ Companies Act, 1948, 11 & 12 Geo. 6, c. 38, §§ 38(2), 417(2).

¹⁴⁷ 9 U.S.C. § 3 (Supp. 1952).

¹⁴⁸ *Wilko v. Swan*, 201 F.2d 439 (2d Cir. 1953), reversing 107 F. Supp. 75 (S.D.N.Y. 1953). The court of appeals decision is noted critically in 53 Col. L. Rev. 735 (1953), 41 Geo. L.J. 565 (1953), 66 Harv. L. Rev. 1326 (1953), 62 Yale L.J. 985 (1953).

¹⁴⁹ *Wilko v. Swan*, 346 U.S. 427 (1953).

¹⁵⁰ 48 Stat. 74 (1933), as amended, 48 Stat. 905 (1934), 15 U.S.C. § 77b(1) (1946).

decisions of the Supreme Court on this topic during the past decade,¹⁶¹ the fifth circuit held this year that certain land purchase contracts were "investment contracts." The buyer's objective was to obtain the profits from the sale of fruit grown on the land under the continued management of the sellers.¹⁶²

*Recovery of Insiders' Profits.*¹⁶³—The most interesting case under Section 16(b)¹⁶⁴ involves the successful invocation of the exemption of arbitrage transactions contained in Section 16(d)¹⁶⁵ in connection with a tax-saving maneuver by a principal shareholder. The transaction consisted of the sale of preferred stock bearing a large declared but unpaid dividend, with a simultaneous purchase on the record date of the same stock ex-dividend, so as to convert the special dividend from ordinary income to capital gains for tax purposes. An attempt by the corporation to capture the alleged "profit" made by the shareholder failed; the transaction fits within the arbitrage exemption, and the Commission's Rule X-16D-1, denying the exemption to officers or directors, does not apply to other "insiders" (*i.e.*, beneficial owners of 10 per cent or more of the stock).¹⁶⁶ It may be appropriate here to record a ruling by the Court of Claims that the recovery of insiders' profits constitutes taxable income to the corporation.¹⁶⁷

The problem of determining who is an insider recurred this year¹⁶⁸ in a case involving the same corporation as in 1952¹⁶⁹ and with the same result: No recovery from an executive (an "officer" under the bylaws) who held the titles of Assistant Treasurer, Assistant Secretary and Manager of the Finance Department, but did not

¹⁶¹ SEC v. C. M. Joiner Leasing Corp., 320 U.S. 344 (1943), discussed in 1943 Annual Surv. Am. L. 361-62; SEC v. W. J. Howey Co., 328 U.S. 293 (1946), discussed in 1946 Annual Surv. Am. L. 545. See Loss, Securities Regulation 299-300, 310-11, 314 (1951).

¹⁶² Blackwell v. Bentsen, 203 F.2d 690 (5th Cir.), cert. granted, 346 U.S. 908 (1953).

¹⁶³ The Securities and Exchange Commission has adopted new rules, effective March 30, 1953, to clarify and describe the reporting requirements imposed by Section 16(a) of the Securities Exchange Act upon trusts (Rule X-16A-8); to provide exemptions from both 16(a) and 16(b) for certain small transactions (X-16A-9); and to exempt from 16(b) the transactions which need not be reported under 16(a) (X-16A-10). Sec. Ex. Act Rel. No. 4801, 2 CCH Fed. Sec. Law Rep. ¶ 25,817 (1953). For an excellent summary on insider-profits law, see Cook & Feldman, Insider Trading under the Securities Exchange Act, 66 Harv. L. Rev. 385 (1953).

¹⁶⁴ 48 Stat. 896 (1934), 15 U.S.C. § 78p(h) (1946).

¹⁶⁵ 48 Stat. 896 (1934), 15 U.S.C. § 78p(d) (1946). For a discussion of this section see Loss, Securities Regulation 589 (1951).

¹⁶⁶ Falco v. Donner Foundation, Inc., 208 F.2d 600 (2d Cir. 1953).

¹⁶⁷ Park & Tilford Distillers Corp. v. United States, 107 F. Supp. 941 (Ct. Cl. 1952), 53 Col. L. Rev. 565 (1953).

¹⁶⁸ Lockheed Aircraft Corp. v. Campbell, 110 F. Supp. 282 (S.D. Cal. 1953).

¹⁶⁹ Lockheed Aircraft Corp. v. Rathman, 106 F. Supp. 810 (S.D. Cal. 1952).

actually perform the functions of the treasurer or secretary¹⁰⁰ and did not participate in the formulation of financial or general corporate policy.¹⁰¹

Successful action on behalf of the corporation to capture short-swing profits under Section 16(b) requires proof that the transaction involved an insider, a sale and a purchase of securities within the statutory period, and a profit. In a recent case,¹⁰² the plaintiff shareholder in Corporation T contended that a fellow stockholder, Corporation M, was an insider because—together with its wholly owned subsidiary D—it controlled more than 10 per cent of T's stock; then he sought to characterize as a sale the transfer from M to D of certain shares in T acquired by M within the preceding six months. But the federal court in New York dismissed the action, pointing out that the plaintiff could not say that D was simply the alter ego of M for the purpose of establishing M's position as an insider, and then turn around and regard D as an independent entity purchasing M's shares in T. There was also considerable doubt that any profit had been realized in the transaction.

Last year we criticized a decision which, for the first time in a series of cases, yielded to the good faith argument as a defense to an action under Section 16(b) despite the clear language of the statute.¹⁰³ This year, the ninth circuit upheld the right of a shareholder to intervene for the purpose of appealing that decision after the corporation had decided not to appeal.¹⁰⁴ The opinion indicates disapproval of the trial court's position.

Brokers-Dealers.—The Securities and Exchange Commission in 1947 devised the so-called Bell-Babbage formula¹⁰⁵ to tighten up its policing of broker-dealer registrations pursuant to Section 15(a)

¹⁰⁰ So that he did not come under Rule X-3B-2. See Sec. Ex. Act. Rel. No. 2687, Nov. 16, 1940.

¹⁰¹ So that he did not meet the test of *Colby v. Klune*, 178 F.2d 872 (2d Cir. 1949).

¹⁰² *Blau v. Mission Corp.*, 113 F. Supp. 153 (S.D.N.Y. 1953).

¹⁰³ *Consolidated Engineering Corp. v. Nesbit*, 102 F. Supp. 112 (S.D. Cal. 1951), 1952 Annual Surv. Am. L. 423, 28 N.Y.U.L. Rev. 486 (1953); also noted critically in 51 Mich. L. Rev. 108 (1952), 5 Stan. L. Rev. 139 (1952). Section 16(b) provides that an action may be brought "irrespective of any intention" on the part of officers, directors and principal stockholders in entering the securities transactions. 48 Stat. 896 (1934), 15 U.S.C. § 78p(b) (1946). See Loss, *Securities Regulation* 564 (1951). In *Jefferson Lake Sulphur Co. v. Walet*, 104 F. Supp. 20, 22 (E.D. La. 1952) the court, in rejecting the good faith defense, observed that the defense had been raised in every reported case under Section 16(b) and rejected in each. The *Walet* case has been affirmed this year. 202 F.2d 433 (5th Cir.), cert. denied, 346 U.S. 820 (1953).

¹⁰⁴ *Pellegrino v. Nesbitt*, 203 F.2d 463 (9th Cir. 1953). The court reversed a decision by the district court, apparently unreported, which denied the shareholder's motion to intervene.

¹⁰⁵ See Loss, *Securities Regulation* 730-33 (1951).

and (b) of the Securities Exchange Act.¹⁶⁶ By joining employees accused of improper conduct as parties to a proceeding for revocation of a broker-dealer registration, the Commission sought to make its findings *res judicata* with respect to such employees in connection with any subsequent steps taken by them to remain in the securities business. This very practical formula failed to pass its first judicial test this year,¹⁶⁷ the court holding that the Commission has no authority to compel an employee to be a party, since Section 15(b) applies only to applicants and registrants, and an alternative—though more cumbersome—procedure is available with respect to employees under Section 21.¹⁶⁸

The employee may have won a Pyrrhic victory, however. The Commission went on to make the findings of improper conduct against him in the original revocation proceeding, and then incorporated such findings into the record of a subsequent revocation proceeding against the broker-dealer currently employing him. When the employee tried to intervene judicially to contest the Commission's adverse ruling against his new employer, arguing that the action violated the spirit of the earlier decision, his petition was dismissed¹⁶⁹ on the ground that the objection had not been urged before the Commission as required by Section 25(a).¹⁷⁰

State Regulation of Securities.—New Blue Sky statutes were enacted by Georgia¹⁷¹ and Illinois¹⁷² during 1953. Oregon's Blue Sky Law¹⁷³ has been construed in several significant respects in a recent decision by the supreme court of that state.¹⁷⁴ The Michigan court has construed provisions of the laws of that state as not requiring the tender of securities prior to bringing suit for the purchase price but, rather, as permitting the tender to be made in court at the time

¹⁶⁶ 48 Stat. 895 (1934), as amended, 49 Stat. 1377 (1936), 52 Stat. 1075 (1938), 15 U.S.C. § 78o(a) and (b) (1946).

¹⁶⁷ *Wallach v. SEC*, 202 F.2d 462 (D.C. Cir. 1953).

¹⁶⁸ 48 Stat. 900 (1934), 15 U.S.C. § 78u(e) (1946). However, employees may still intervene voluntarily.

¹⁶⁹ *Wallach v. SEC*, 206 F.2d 486 (D.C. Cir. 1953). In effect the Commission has abandoned its former view that only a party to a revocation proceeding is bound thereby.

¹⁷⁰ 48 Stat. 901 (1934), 15 U.S.C. § 78y(a) (1946).

¹⁷¹ Georgia Securities Act, enacted by Ga. Laws 1953, No. 397, app. March 3, 1953.

¹⁷² Illinois Securities Law of 1953, Ill. Rev. Stat. c. 121½, §§ 137.1 et seq. (Smith-Hurd Supp. 1954), enacted by Ill. Laws 1953, p. 1329, eff. Jan. 1, 1954.

¹⁷³ Oregon Securities Law, Ore. Rev. Stat. §§ 59.010 et seq. (1953).

¹⁷⁴ *Hartford Accident & Indemnity Co. v. Ankeny*, 261 P.2d 387 (Ore. 1953). The court ruled: (1) the statutory limitations period for bringing an action to recover the purchase price of securities sold in violation of the statute has no application to an action in which the claim is based on the dealer's alleged conversion of money and securities deposited with him; and (2) the liability of a surety on the dealer's bond is not limited to the dealer's conversion or misappropriation of funds and securities deposited with him.

of trial.¹⁷⁵ California's comprehensive Corporate Securities Act grants buyers the right to recover the purchase price of securities which are issued or sold without the necessary permit from the Commissioner of Corporations.¹⁷⁶ This statute was recently invoked under circumstances in which it was never meant to apply, when the part owner of a small and unprofitable close corporation, which had never obtained a permit to issue shares or to take preincorporation subscriptions, sought to recover his capital contribution on the ingenious theory that the corporation or its co-owners had issued and sold shares to him without a permit. The California Supreme Court held that the evidence adduced at the trial justified the conclusion that the plaintiff had participated on an equal footing with the other owners both in the organization and in the subsequent operation of the corporation; therefore, his acquisition of a one-third interest in the corporation could not be deemed to have resulted from a "sale" or "issue" within the meaning of the statute.¹⁷⁷

V

FOREIGN CORPORATIONS

Service of Process.—The year 1953 produced the usual volume of service of process cases, but there were no outstanding developments. With a few exceptions, both the federal and state courts purported to adopt and apply the "fair play and substantial justice" test first announced by the United States Supreme Court in the *International Shoe* case.¹⁷⁸ The most important exception was a decision by the New York Court of Appeals¹⁷⁹ in which the court conspicuously ignored the fundamental change in approach wrought by the *International Shoe* case¹⁸⁰ and proceeded to dispose of a major jurisdictional

¹⁷⁵ Nelson v. O'Dell, 335 Mich. 50, 55 N.W.2d 723 (1952), construing Mich. Comp. Laws § 451.120 (1948).

¹⁷⁶ Cal. Corporate Securities Law, Cal. Corp. Code §§ 25,000 et seq., esp. § 25,153 (1953).

¹⁷⁷ Holmberg v. Marsden, 39 Cal.2d 592, 248 P.2d 417 (1952).

¹⁷⁸ International Shoe Co. v. Washington, 326 U.S. 310 (1945), 1945 Annual Surv. Am. L. 37-39. See 1948 Annual Surv. Am. L. 522; 1949 Annual Surv. Am. L. 575-76; 1951 Annual Surv. Am. L. 478-80. See also Notes, The Growth of the International Shoe Doctrine, 16 U. of Chi. L. Rev. 523 (1949); The International Shoe Doctrine and Jurisdiction on the Basis of Acts, 18 U. of Chi. L. Rev. 792 (1951).

¹⁷⁹ Elish v. St. Louis S.W. Ry., 305 N.Y. 267, 112 N.E.2d 842 (1953).

¹⁸⁰ It seems clear that state courts are free to set their own standards for assertion of local jurisdiction over foreign corporations, so long as they meet the minimum constitutional standards established by the United States Supreme Court. See Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952), 1952 Annual Surv. Am. L. 427-28, 28 N.Y.U.L. Rev. 490-91 (1953). Where state decisions impose "stricter" standards than those prescribed by the Supreme Court, federal courts apply the state standards in diversity cases. Partin v. Michaels Art Bronze Co., 202 F.2d 541 (3d Cir. 1953);

problem—the amenability to process of a foreign railroad corporation having no lines in the state—on the basis of the “solicitation plus” formula of the cases decided under the obsolete “presence” theory.¹⁸¹ The railroad corporation was held amenable to process in an action to nullify the declaration of a dividend on preferred stock because, in addition to soliciting freight business in the forum, the railroad also maintained an executive office in New York for handling transactions related to its financial structure. Application of the *International Shoe* test of fairness and convenience would probably have yielded the same result. Since it appeared that the corporation’s New York office was the principal headquarters for determining over-all financial policy, New York would not be an inconvenient forum for the defense of this particular suit, even though the technical situs of the cause of action is in the chartering state.¹⁸²

Reliance on the “solicitation plus” formula was likewise evident in a decision by the Supreme Court of Utah which involved the currently familiar practice of solicitation of orders over a television station.¹⁸³ The defendant was a foreign cosmetic manufacturer which had no office or agents in the forum. Orders for defendant’s product were solicited over a local television station by means of filmed “commercials” in which viewers were instructed to telephone their orders to a certain number, which was the telephone number of the television station. The orders phoned in to the station were then relayed by it to the manufacturer’s principal office, where they were filled and shipped C.O.D. In a suit by a resident against the manufacturer for injuries allegedly resulting from the use of the cosmetics, service of process was made on the local television station. The Utah court quashed the service and dismissed the suit for lack of jurisdiction: The television station was not a proper agent for service of process on the defendant and, further, mere solicitation does not constitute “doing business.”

Among the current cases which have followed the *International Shoe* approach, the most interesting is a decision by the Supreme Court of New Hampshire, which holds a foreign publishing corporation amenable to process in a libel suit because all of the printing and mailing of its magazines was done in the forum, although by an

Canvas Fabricators, Inc. v. William E. Hooper & Sons Co., 199 F.2d 485 (7th Cir. 1952); Charles Keeshin, Inc. v. Gordon Johnson Co., 109 F. Supp. 939 (W.D. Ark. 1952).

¹⁸¹ E.g., *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259, 115 N.E. 915 (1917).

¹⁸² On the importance of forum non conveniens considerations in the *International Shoe* doctrine, see *Kilpatrick v. Texas & Pacific Ry.*, 166 F.2d 788 (2d. Cir. 1948); *Healing v. Isbrandtsen Co.*, 109 F. Supp. 605 (S.D.N.Y. 1952).

¹⁸³ *McGriff v. Charles Antell, Inc.*, 256 P.2d 703 (Utah 1953).

independent contractor.¹⁸⁴ The corporation itself had no office or employees in the state.

¹⁸⁴ *Labonte v. American Mercury Magazine, Inc.*, 96 A.2d 200 (N.H. 1953). The court held that service of process on the secretary of state was valid under N.H. Rev. Laws c. 280 (1942), as amended by N.H. Laws 1949, c. 206, §§ 4, 8. On this point, cf. 1951 Annual Surv. Am. L. 479 n.145.

Other current cases applying the International Shoe test include *Taylor v. Klenzade Products, Inc.*, 92 A.2d 910 (N.H. 1952); *Ott v. Hudnut Sales Co.*, 107 F. Supp. 919 (D. Colo. 1952); *Insurance Co. of North America v. Lone Star Package Car Co.*, 107 F. Supp. 645 (S.D. Tex. 1952); *Ackerley v. Commercial Credit Co.*, 111 F. Supp. 92 (D.N.J. 1953).

BANKRUPTCY

CHARLES SELIGSON

THE OVER-ALL picture on recent decisions is one of expanding horizons in the area of equitable jurisdiction of the bankruptcy court, and one of many sharp conflicts among the courts evidenced by reversals and vigorous dissenting opinions arising out of different approaches to interpretations of the bankruptcy sections in issue. Both wage earners and lienholders were affected by decisions of the United States Supreme Court, the former adversely¹ and the latter favorably.² The impact of these decisions is a heavy one. Wage earners denied priority under Section 64(a)(5) of the Bankruptcy Act³ for back-pay awards made by the National Labor Relations Board must look to Congress for relief unless the courts are prepared by a liberal construction of the three-month limitation of Section 64(a)(2) of the Act⁴ to bring them within the protection of that section. Lienholders should derive much satisfaction from the favorable decision rendered in the *New Haven* case.⁵ They are now assured that they cannot lose their liens in bankruptcy proceedings except through due process of law. A wide variety of other challenging problems was considered, involving tax claims, always vexing in bankruptcy administration; the scope of the trustee's powers to recover assets for the estate; the subordination of claims; and the disallowance of corporate claims for voting purposes.

I

REORGANIZATION

Bar Order: Requirements of Reasonable Notice to Lien Claimants.—Bankruptcy legislation which modifies a secured creditor's rights, remedial or substantive, to such an extent as to deny the due process of law guaranteed by the Fifth Amendment has been held to be unconstitutional.⁶ The Supreme Court has now made it plain that it is not enough that the bankruptcy statute itself satisfies the constitutional requirement of due process of law, but that a violation of

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¹ *Nathanson v. NLRB*, 344 U.S. 25 (1952).

² *City of New York v. New York, N.H. & H.R.R.*, 344 U.S. 293 (1953).

³ 30 Stat. 563 (1898), as amended, 11 U.S.C.A. § 104(a)(5) (1953).

⁴ 30 Stat. 563 (1898), as amended, 11 U.S.C.A. § 104(a)(2) (1953).

⁵ *City of New York v. New York, N.H. & H.R.R.*, 344 U.S. 293 (1953).

⁶ *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935).

the fundamental concept of procedural due process of law in course of the administration of a bankruptcy proceeding will not be tolerated. In *City of New York v. New York, N.H. & H.R.R.*,⁷ which involved a railroad reorganization proceeding under Section 77 of the Bankruptcy Act,⁸ a bar order was made by the reorganization court prescribing the period within which claims might be filed. The bar order was twice published in various newspapers and copies thereof were mailed to certain creditors. No personal notice was served upon the City of New York, a known lien creditor, and no claim was filed by the city. The old railroad's properties were transferred to the reorganized company free from the city's liens. On the reorganized company's application, the district court held the liens were void and enjoined their enforcement.⁹ The court of appeals affirmed,¹⁰ Judge Frank dissenting.

Section 77(c)(8) of the Act provides that "[t]he judge shall cause reasonable notice of the period in which claims may be filed . . . to be given creditors . . . by publication or otherwise."¹¹ Whether the city had received "reasonable notice" within the meaning of that section was the important question posed by the case, and that question was answered in the negative by the Supreme Court. The Court unanimously agreed that publication of the bar order in newspapers was not reasonable notice to the city in the circumstances of the case, and that such notice was not sufficient to support the destruction of the city's liens. The city had knowledge of the pendency of the reorganization proceeding. This, however, was deemed immaterial by the Court and insufficient to charge it with the duty to inquire about possible court orders limiting the time for filing claims. The city was justified in assuming that the statutory "reasonable notice" would be given it before its claims were barred forever.

The Court's conclusion in the instant case is bottomed upon the statutory mandate for reasonable notice, but implicit in its decision is the admonition that the constitutional mandate of due process must be respected. As Mr. Justice Black, speaking for the Court observed, "The statutory command for notice embodies a basic principle of justice—that a reasonable opportunity to be heard must precede judicial denial of a party's claimed rights."¹²

It should be noted that the Supreme Court did not rule out notice by publication as reasonable notice in an appropriate case.

⁷ 344 U.S. 293 (1953).

⁸ 47 Stat. 1474 (1933), as amended, 11 U.S.C. § 205 (1946).

⁹ In re New York, N.H. & H.R.R., 105 F. Supp. 413 (D. Conn. 1951).

¹⁰ In re New York, N.H. & H.R.R., 197 F.2d 428 (2d Cir. 1952).

¹¹ 47 Stat. 1474 (1933), as amended, 11 U.S.C. § 205(c)(8) (1946).

¹² *City of New York v. New York, N.H. & H.R.R.*, 344 U.S. 293, 297 (1953).

Although it pointed out that "[i]ts justification is difficult at best," it recognized that "when the names, interests and addresses of persons are unknown, plain necessity may cause a resort to publication."¹³ In accord with this view is a recent decision of the Court of Appeals for the Fifth Circuit.¹⁴ That case arose in a composition proceeding under Chapter IX of the Bankruptcy Act.¹⁵ An amended plan of composition was confirmed by the court and a finding made that proper notice had been given. Written notice of the approval of the proposed plan and of the date fixed for a hearing thereon had been mailed to each known creditor and such notice had also been published three times in two different papers. In addition, written notice of amendments to the original plan had been mailed to all known creditors. One year after the entry of a final decree which required that creditors' claims be filed within 365 days or otherwise be barred, appellant, an unknown creditor, as owner of bonds which it held as trustee, intervened and prayed that the decrees be reopened and that appellant be decreed to be unaffected by the composition. Appellant argued that as a creditor it had been denied due process of law, in that it had not been given adequate notice of the composition proceeding prior to the entry of the final decree.

The district court refused to reopen its decrees and dismissed the intervening petition. It did, however, allow appellant to file its claim one day late and to participate in the benefits of the plan. The district court determined that the debtor had no knowledge of appellant's claim, and that it had made a diligent effort to ascertain the identity of all bondholders. The court also found that appellant had not been diligent in presenting its claim, despite the fact that it had known for many years of the insolvency of the debtor.

The court of appeals affirmed.¹⁶ That court declared that "[t]he notice given complies with the statute, 11 U.S.C.A. § 403, and in the circumstances here presented satisfies the requirements of due process."¹⁷ The rationale of its decision was that in a composition proceeding, which is in the nature of a proceeding in rem, notice by publication constitutes due process of law as to unknown creditors, where reasonable diligence has been exercised to afford personal notice. In this class of cases, and under the facts here shown, the duty rested upon the unknown creditor to keep itself informed as

¹³ *Id.* at 296.

¹⁴ *San Augustine County v. Cameron County Water Improvement Dist.*, 202 F.2d 932 (5th Cir. 1953).

¹⁵ 50 Stat. 654 (1937), as amended, 11 U.S.C. § 401 et seq. (1946).

¹⁶ *San Augustine County v. Cameron County Water Improvement Dist.*, 202 F.2d 932 (5th Cir. 1953).

¹⁷ *Id.* at 934.

to what was happening in regard to the property in which it was interested.

Avoidance of Postpetition Transfers.—Section 70(d),¹⁸ added by the 1938 amendments, adopts the theory of protected post-bankruptcy transactions. This creates an exception to the general rule that the rights of all parties are fixed and determined as of the date of the filing of the bankruptcy petition.¹⁹ It has been said

that § 70d (as supplemented by § 21g), together with § 63b, defines the full extent to which *bona fide* transactions with the bankrupt, *after* bankruptcy, will be protected. Subject to the exceptions thus created, the bankruptcy petition is still a *caveat* and persons dealing with the bankrupt thereafter do so at their peril.²⁰

Congress seems to have intended that the courts may not go beyond the definite limits set by Section 70(d) in carrying out the theory of protected transfers. Congress, however, did not prescribe the procedure to be followed for the determination of the question as to whether a transaction is protected. Thus whether the trustee must take plenary action against the transferee or may initiate summary proceedings in the bankruptcy court would seem to depend upon generally accepted bankruptcy principles.

It has long been recognized that summary jurisdiction rests upon possession of the property by the bankruptcy court at the time of the filing of the bankruptcy petition.²¹ That possession may be actual or constructive. It is constructive where the holder of the property has no adverse claim thereto. The mere assertion of such a claim is not sufficient to defeat the summary jurisdiction of the bankruptcy court.²² That court may conduct a preliminary inquiry to determine whether the asserted claim is adverse or merely colorable. It has been suggested that these principles are applicable to proceedings involving Section 70(d) and that an adverse claim may arise after bankruptcy.²³ Two recent cases²⁴ for the recovery of postpetition payments made in the same reorganization proceeding would appear to accept that view.

It is difficult to see how a transferee can ever be entitled to a plenary action for the determination of his claim of protected transaction. Stated differently, no adverse claim for procedural purposes

¹⁸ 52 Stat. 880 (1938), 11 U.S.C. § 110(d) (1946).

¹⁹ 4 Collier, Bankruptcy ¶ 70.05 (14th ed. 1942).

²⁰ 4 id. at 1331.

²¹ 2 id. ¶ 23.04.

²² Taubel-Scott-Kitzmiller Co. v. Fox, 264 U.S. 426 (1924).

²³ 4 Collier, Bankruptcy ¶ 70.68 (14th ed. 1942).

²⁴ Lehman v. Quigley, 118 N.Y.S.2d 579 (Sup. Ct. 1952); Lehman v. Cameron, 124 N.Y.S.2d 490 (Sup. Ct. 1953).

can possibly arise after bankruptcy. The bankruptcy date is still the decisive date for so-called jurisdictional or procedural purposes. If no adverse claim exists on that date, none can be acquired thereafter. The trustee, however, may lose on the merits in the summary proceedings. The trustee need only show that the postbankruptcy transfers were made and the transferee, if he invokes Section 70(d), then has the burden of proof. He "must prove by preponderance of the evidence that he is within the saving terms of the provision."²⁵

Cases decided prior to the passage of the Chandler Act²⁶ which seem to indicate that an adverse claim sufficient to defeat the summary jurisdiction of the bankruptcy court may be acquired after bankruptcy are distinguishable, and in any event should not be regarded as controlling. In one such case,²⁷ a summary application was made to require the treasurer of a bankrupt corporation to turn over moneys which he had in fact paid out on prebankruptcy debts of the corporation between the filing of the petition and the date of adjudication. As the court put it, "The respondent no longer having the money, and having accounted for it in this way, the question is whether he can be required by summary order to make it good."²⁸ This question the court rightly answered in the negative. The court refused to treat the money as constructively in the respondent's hands. Since he did not have the moneys a summary order for the return thereof could not be entered against him. In so deciding the case, the court emphasized the fact that as the law then stood, "the filing of an involuntary petition does not, ipso facto, take from him his dominion over it."²⁹ The court pointed out that the bankruptcy court, if it saw fit to exercise the power, could undoubtedly put the property within its control. Prior to adjudication, however, the property was still the bankrupt's, title only vesting in the trustee, as of that date, after an order of adjudication was made.

In another early case,³⁰ a bank had honored checks on the bankrupt's deposit account with the bank, one day after the filing of an involuntary bankruptcy petition, and on the same day that a receiver was appointed and qualified. This was done by the bank without any actual notice of such filing. The court of appeals agreed with the district court³¹ that a summary order could not be entered

²⁵ 4 Collier, Bankruptcy 1337 (14th ed. 1942).

²⁶ 52 Stat. 840 (1938), 11 U.S.C. § 1 et seq. (1946).

²⁷ *In re Laplume Condensed Milk Co.*, 145 Fed. 1013 (M.D. Pa. 1906).

²⁸ *Id.* at 1014.

²⁹ *Ibid.*

³⁰ *In re Zotti*, 186 Fed. 84 (2d Cir.), cert. denied sub nom. *Watson v. European American Bank*, 223 U.S. 718 (1911).

³¹ *In re Zotti*, 178 Fed. 304 (S.D.N.Y. 1910).

against the bank. This court also emphasized the point that until adjudication, title to the deposit account remained in the bankrupt, and it rejected the notion that the trustee was vested with the title of the bankrupt as of the time of the filing of the petition. In still another case,³² the court refused to enter a summary order against a bank which in the ordinary course of business and in good faith had honored a check against funds which were part of the bankrupt's estate. The court ruled that the bank had a defense on the merits to the turnover application but it also stated that the payments involved in the case could be defended on the ground that title to the bankrupt's property remained in him until adjudication.

These cases are all distinguishable because in none did the trustee attempt to recover the moneys involved from the persons receiving the payments, the transferees. Furthermore, it is important to remember that the statute now has been changed so as to provide that the trustee shall "be vested by operation of law with title of the bankrupt as of the date of the filing of the petition,"³³ and not as of the date of adjudication.

In the two recent cases³⁴ mentioned above, negligence actions were pending against the one debtor at the time of the filing of an involuntary reorganization petition under Chapter X of the Act.³⁵ In one,³⁶ the action came on for trial prior to the approval of the petition and a judgment was obtained against the debtor. This judgment was satisfied by check payable to the order of the plaintiff and his attorney. The proceeds of the check were disbursed in accordance with the terms of the agreement of retainer. Some time after approval of the petition the reorganization trustees sued the attorney and his client under Section 70(d) to recover the amount of the payment. The court found that the defendants had at all times acted in good faith. The court, however, declared that good faith alone was insufficient, referring to the requirement of Section 70(d) that "there must be a concurrence of a present fair equivalent for the transfer." In the court's opinion, by the use of the term "present fair equivalent value" in Section 70(d), "what is meant and intended is not a reduction of the liabilities but an increase or exchange of assets and that the transaction should result in an increase of the common fund."³⁷ The court correctly pointed out that the payment to the defendants operated

³² *In re Retail Stores Delivery Corp.*, 11 F. Supp. 658 (S.D.N.Y. 1935).

³³ Bankruptcy Act § 70(a), 52 Stat. 879 (1938), as amended, 66 Stat. 429 (1952), 11 U.S.C.A. § 110(a) (1953).

³⁴ See note 24 *supra*.

³⁵ 52 Stat. 883 (1938); 11 U.S.C. §§ 501-676 (1946).

³⁶ *Lehman v. Quigley*, 118 N.Y.S.2d 579 (Sup. Ct. 1952).

³⁷ *Id.* at 582.

only to reduce liability. Hence "[t]he estate available to creditors for distribution was accordingly diminished."

In the second case,³⁸ the cause of action involved in the decision was only one of many asserted in the complaint against numerous attorneys and clients who received postpetition payments from the debtor on settlements or judgments in personal injury actions pending when the reorganization petition was filed. That cause of action arose out of an action that was settled during trial prior to the approval of the petition. The debtor issued a check payable to the order of the plaintiffs and their attorney, and the proceeds were presumably disbursed as provided in the retainer agreement. The reorganization trustees sued both the clients and the attorney. The trustees prayed that the transfer to the defendants be decreed "to be invalid, preferential, void or voidable"; they did not serve the clients but sought to recover the full amount of the check from the attorney as joint payee. The action was brought under Section 70(d). The attorney defendant moved for summary judgment. He claimed that he received payment as agent for his client and that he received only part of the proceeds and remitted the balance to his client. He also denied that he had received preferential treatment. The court declared it was clear that this defendant was not entitled to summary judgment because there were factual questions which could not be resolved on affidavits. The court, however, went much further, for it stated

[e]ven if these factual issues are resolved in the defendant's favor, the plaintiffs may still be entitled to recover from this defendant at least so much of the money as he took from the proceeds of the check. It is not sufficient for the defendant to establish his good faith. He must also establish that the transfer was made for a present fair equivalent value.³⁹

In this case, despite the lack of "present fair equivalent value," it may be that the moving defendant could still prevail. Apparently the action was not instituted until about two years after the filing of the reorganization petition and the two-year statute of limitations prescribed by Section 11(e) of the Act⁴⁰ might be held to be applicable. Apart from this, the trustees might be precluded from asserting their claims against the defendants and particularly the attorney defendant. Witnesses present to give testimony at the trial might no longer be available. Thus the plaintiffs in the negligence action might not be able to establish a claim in the reorganization proceeding. What is worse in this particular situation is that the attorney would be without

³⁸ *Lehman v. Cameron*, 124 N.Y.S.2d 490 (Sup. Ct. 1953).

³⁹ *Id.* at 492.

⁴⁰ 52 Stat. 849 (1938), 11 U.S.C. § 29(e) (1946).

a remedy against his clients for the amount remitted to them. It is doubtful that he could locate them, and if he did, the possibilities are that they would be financially irresponsible. In this respect, it should be noted that the trustees were unable to serve the clients in the instant action. Of course if the settlement were set aside, the original claim of the clients against the debtor should be reinstated.

In these two cases, Section 70(d) was directly involved and properly so. In a recent Louisiana case,⁴¹ the plaintiff trustee seems to have been unaware of the existence of Section 70(d). In that case, the trustee sought to recover the value of certain property of the bankrupt claimed to have been illegally diverted from the bankrupt estate in violation of the Louisiana Bulk Sales Act⁴² over a month after the date of adjudication. The action apparently was under Section 70(e)(1) of the Bankruptcy Act which provides that

a transfer made . . . by a debtor adjudged a bankrupt under this Act which, under any Federal or State law applicable thereto, is fraudulent as against or voidable for any other reason by any creditor of the debtor, having a claim provable under this Act, shall be null and void as against the trustee of such debtor.⁴³

The challenged transfer, as stated, had been made after bankruptcy. The court decided that the property transferred was "community property belonging to the community of acquets and gains existing" between the bankrupt and his wife. As such, the court held the property was part of the bankrupt estate. The court also found that the transfer had been made in violation of the Louisiana Bulk Sales Act and was therefore void. In addition, it decided "that the defendants knew or should have known that they were dealing with a bankrupt." Accordingly the defendants were liable to the trustee for the fair market value of the property acquired by them, and this liability was based upon Section 70(e)(1) of the Act.

It is doubtful that Section 70(e)(1) applied to the transaction at all. That section deals with transfers made prior to the filing of the bankruptcy petition. It has no application to transfers made subsequent thereto. Section 70(d) was clearly applicable. Since the transfer took place after adjudication, Section 70(d) afforded no protection whatsoever to the transferees, and the bulk sale was void thereunder.

A more difficult question would have arisen if the defendant transferees had acted in good faith in the transaction, and the sale had been made before adjudication. Since the transfer would have

⁴¹ *Holahan v. Misuraca*, 112 F. Supp. 504 (E.D. La. 1953).

⁴² La. Rev. Stat. Ann. tit. 9, § 2962 (West 1951).

⁴³ 30 Stat. 565 (1898), as amended, 11 U.S.C.A. § 110(e)(1) (1953).

been made for "present fair equivalent value," if the transferees had no actual or constructive knowledge of the pendency of the bankruptcy petition, the trustee could not have relied upon Section 70(d). The transaction would have been a protected one under that section. But the postpetition bulk sale probably would have been void as to the trustee by virtue of the status given to him under Section 70(c) of the Act⁴⁴ as a creditor who had acquired a lien on the bankrupt's property through legal or equitable proceedings as of the date of bankruptcy.

Liability of Reorganized Company for Taxes Arising during Trustee's Administration.—Section 271 was incorporated in the Bankruptcy Act by the 1938 amendments. That section, which is included in Chapter X dealing with corporate reorganization, reads as follows:

Any provision in this chapter to the contrary notwithstanding, all taxes which may be found to be owing to the United States or any State from a debtor within one year from the date of the filing of a petition under this chapter and have not been assessed prior to the date of the confirmation of a plan under this chapter, and all taxes which may become owing to the United States or any State from a receiver or trustee of a debtor or from a debtor in possession, shall be assessed against, may be collected from and shall be paid by the debtor or the corporation organized or made use of for effectuating a plan under this chapter: *Provided, however,* That the United States or any State may in writing accept the provisions of any plan dealing with the assumption, settlement, or payment of any such tax.⁴⁵

This section breaks down into two parts, one dealing with taxes found to be owing from a debtor and the other treating taxes which may become owing from a receiver, trustee or debtor in possession. Thus the first part deals with prepetition taxes and the second with postpetition taxes which are classified as expenses of administration.

Referring to the first part, it has been well said that

the conditions under which the debtor's pre-reorganization taxes may be assessed against the transferee corporation are vague and ambiguous. It is not clear whether the one year limitation refers to the *finding* ("found to be owing . . . within one year . . .") or to due date ("found to be owing . . . within one year . . .") of the tax liability.⁴⁶

Where the debtor's assets are transferred to another corporation under the provisions of a confirmed plan of reorganization, "Section 271 operates as a kind of assumption *ex lege* of tax indebtedness." That section apparently "creates rather a cumulative liability giving the federal or state government an additional safeguard." In addition,

⁴⁴ 52 Stat. 880 (1938), as amended, 11 U.S.C.A. § 110(c) (1953).

⁴⁵ 52 Stat. 904 (1938), 11 U.S.C. § 671 (1946).

⁴⁶ 6 Collier, Bankruptcy 3222 (14th ed. 1947).

the liability of "the corporation organized or made use of for effectuating a plan" does not seem to be limited to the value of the assets transferred to it.⁴⁷

In the *Redwine* case,⁴⁸ the construction of the first part of Section 271 was called into question. That was an action by a reorganization trustee to enjoin the Georgia Revenue Commissioner from proceeding with the assessment and collection of income tax deficiencies, alleged to be owing to the State of Georgia by the debtor, and assessed after confirmation of the reorganization plan under Chapter X.

On January 17, 1950, the proposed reorganization plan was approved. The order of approval permitted creditors and stockholders to file their proofs of claim by January 31, 1950. An order of confirmation was made on February 2, 1950, and it declared that the plan should be binding upon all creditors, following the language of Section 224(1) of the Act.⁴⁹ After confirmation, the Department of Revenue proposed to make adjustments in the income tax liability of the debtor for the period beginning July 1, 1946, and lasting through 1948, and so advised the trustee. This alleged liability to the State of Georgia was not scheduled by the debtor nor did the trustee have any notice or knowledge thereof. The trustee advised the Department of Revenue that the time for filing claims had expired but the Department insisted upon its right to make the additional assessment. The trustee thereupon brought this action for injunction. The state Revenue Commissioner relied upon Section 271

and contended that, by virtue of said section, the State as a matter of right could assert its claim for taxes due but unassessed, prior to the confirmation of the plan of reorganization, provided only that such claim be made within one year from the date of the filing of the petition.⁵⁰

The district court refused to accept this construction of the statute and therefore granted the injunction.

The court of appeals agreed with the Commissioner, however, and reversed. It pointed out that Section 271 contemplates two tax situations, those dealing with prereorganization taxes and those involving taxes arising thereafter. It was not concerned with the latter because, as it stated, "it obviously applies to current taxes which accrued during the administration of the reorganization proceeding."⁵¹

⁴⁷ 6 *id.* at 5221.

⁴⁸ *Redwine v. Citizens & Southern Nat. Bank*, 189 F.2d 328 (5th Cir. 1951).

⁴⁹ 52 Stat. 898 (1938), 11 U.S.C. § 624(1) (1946).

⁵⁰ *Redwine v. Citizens & Southern Nat. Bank*, 189 F.2d 328, 330 (5th Cir. 1951).

⁵¹ *Ibid.*

The court was of the opinion that the state's claim fell squarely within the first situation contemplated in Section 271, and that the state was entitled to the benefit of the same. According to it, "The taxes here claimed were found to be owing within one year from the filing of the petition, and were not assessed prior to the date of the confirmation of the plan of reorganization."⁵²

The court was fortified in its conclusion by the House Committee Report on Section 271, which stated that

[t]his assumption clause is designed to give adequate protection to the interests of the United States Government not only in connection with taxes which became due during the pendency of the proceedings, but also in cases where the current tax return had not been filed during such period or where the amount of tax liability for a prior period had not been adequately determined by the Treasury Department prior to confirmation of the plan.⁵³

On the basis of this report, and the fact that Section 271 was approved by the House of Representatives without change, it was evident to the court "that taxes of a prior period, inadequately determined, may be asserted under Section 271 of the Act as a matter of right, and may be paid as proper expenses of administration."⁵⁴

In another recent case,⁵⁵ the court was required to construe the second part of Section 271 dealing with postreorganization taxes. Florida county real estate and personal property taxes were involved. The collector invoked Section 271

and the settled rule of law, that taxes accruing during the period of the trustee's possession constitute a lien upon the properties, are payable as costs of administration of the estate in reorganization, and, if not paid by the trustee, remain a charge on the properties in the hands of the taker in reorganization.⁵⁶

Accordingly, the collector applied to the bankruptcy court for permission to collect from a successor corporation provided for in a reorganization plan taxes which had accrued during the period of time of the trustee's possession of the properties. The successor corporation argued that the taxes were not taxes owing to any state within the meaning of Section 271 and that the lien of the collector for such taxes "was extinguished and the claim for them cut off by the findings and orders made in the reorganization proceedings." The plan contained the usual provisions that upon confirmation it should be binding upon all creditors, whether or not such creditors had accepted the

⁵² *Ibid.*

⁵³ H.R. Rep. No. 1409, 75th Cong., 1st Sess. 55 (1937).

⁵⁴ *Redwine v. Citizens & Southern Nat. Bank*, 189 F.2d 328, 330-31 (5th Cir. 1951).

⁵⁵ *Berryhill v. Gerstel*, 196 F.2d 304 (5th Cir. 1952).

⁵⁶ *Id.* at 305.

plan or had filed proofs of claim, and whether or not their claims had been scheduled. In addition, the plan provided that the assets of the debtor were to be transferred to the successor corporation, free and clear of all liens or claims, except a specific encumbrance not here involved. The successor corporation had also supplied a special fund for the payment of preferred creditors and all administration expenses.

The court of appeals agreed with the collector that the taxes were "taxes due any state" within the meaning of Section 271. The court also declared that the tax claims "must be paid as expenses of administration, either by the trustee out of the deposited funds" or by the successor corporation, which had "succeeded to the trustee's position as to the properties on which the taxes are liens, and, therefore, stands in his shoes as to the obligation to see that they are paid."⁵⁷ The court reasoned this result from what it said was manifest from the express provision of Section 271, from cases cited by the collector, and its own decision in the *Redwine* case.

Section 226 very plainly states that the property dealt with by the plan, when transferred by the trustee, as provided in the plan,

shall be free and clear of all claims and interests of . . . creditors . . . except such claims and interests as may otherwise be provided for in the plan or in the order confirming the plan or in the order directing or authorizing the transfer or retention of such property.⁵⁸

Section 226 would seem to be in conflict with Section 271 in regard to the taxes in question in the absence of other provisions in the plan or orders of the court, but the latter section is of course controlling. Section 216⁵⁹ declares that a plan must provide for the payment of all costs and expenses of administration. In view of that section and the fact that Section 221(1)⁶⁰ provides as a condition precedent to a confirmation of a plan that the judge be satisfied that the provisions of Article X (which consists of Section 216) have been complied with, the expenses of administration, embracing the unpaid taxes, should have been fixed and determined before confirmation, and provision for the payment thereof made by the trustee. In any event, the decision of the court, which appears to be correct on the facts, should serve as a warning to courts and all interested parties that a plan should not be confirmed unless adequate provision is made for the payment of administration expenses, including postpetition taxes, and also points up the danger that the assets acquired or revested may be

⁵⁷ Id. at 307.

⁵⁸ 52 Stat. 898 (1938), 11 U.S.C. § 626 (1946).

⁵⁹ 52 Stat. 895 (1938), 11 U.S.C. § 616 (1946).

⁶⁰ 52 Stat. 897 (1938), 11 U.S.C. § 621(1) (1946).

burdened under a plan of reorganization with hidden liabilities which constitute liens against the same.

II

BANKRUPTCY

Liquidation of Assets: Liability for State Sales Taxes.—In a recent case⁶¹ the Court of Appeals for the Ninth Circuit has reaffirmed its prior holding⁶² that the California sales tax⁶³ does not apply to liquidation sales of property made by a bankruptcy trustee pursuant to court order. Thus another onslaught against the jurisdiction of the bankruptcy court in bankruptcy proceedings was repelled.

In the instant case, the trustee was directed by court order to sell the assets of the bankrupt estate. He sold five trucks at auction and did not report or pay the California sales tax thereon. The referee enjoined the State Board of Equalization from collecting the tax and from imposing a penalty for nonpayment. The district court⁶⁴ upheld the referee and the Board appealed. The Board argued that the court lacked jurisdiction, that the sale was made while the trustee was operating the business, and that even if he was not, the sale was subject to tax.

The state law imposes a sales tax on every person engaged in the business of making retail sales,⁶⁵ and as defined in amendments enacted subsequent to the prior decision of the appeals court, the term "person" included a bankruptcy trustee.⁶⁶ A federal statute⁶⁷ provided that a trustee who conducted any business should be subject to all state and local taxes applicable to such business. State and federal law, so the Board contended, therefore imposed the tax on the liquidation sale of the trustee.

The jurisdiction of the bankruptcy court to issue the injunction was clear, and that was the conclusion reached by the court of appeals. That jurisdiction rested upon the broad power "to make such judgments as may be necessary for the enforcement of the provisions of the Bankruptcy Act." The exercise of this power did not conflict with another statute⁶⁸ denying jurisdiction to the district courts in suits involving state taxes, for "[t]he process of dealing with state

⁶¹ California State Board of Equalization v. Goggin, 191 F.2d 726 (9th Cir.), cert. denied, 342 U.S. 909 (1951).

⁶² State Board of Equalization v. Boteler, 131 F.2d 386 (9th Cir. 1942).

⁶³ Cal. Rev. & Tax. Code § 6001 et seq. (1952).

⁶⁴ In re West Coast Cabinet Works, Inc., 92 F. Supp. 636 (S.D. Cal. 1950).

⁶⁵ Cal. Rev. & Tax. Code §§ 6015, 6051 (1952).

⁶⁶ Cal. Rev. & Tax. Code § 6005 (1952).

⁶⁷ 48 Stat. 993 (1934). See also 28 U.S.C. § 980 (Supp. 1952).

⁶⁸ 28 U.S.C. § 1341 (Supp. 1952).

tax assessments is one essential to the administration of a bankruptcy estate and does not amount to a suit against the state."⁶⁹

Here the question presented was not whether the sales tax applied to a bankruptcy trustee, but whether it applied "to sales made by him *in the liquidation of the bankrupt estate pursuant to court order*."⁷⁰ (Emphasis supplied.) The appeals court conceded that the construction of the California tax statute was a matter of state law binding upon it. In its judgment, however, the California courts had construed the statute so as to limit it to sales made in the ordinary course of conducting a retail business. The tax was geared to the federal statute, and a harmonious application of the federal and state laws involved compelled the conclusion "that in making the sale of the assets of the bankrupt estate pursuant to court order for the purpose of liquidation, the trustee was not subject to the California sales tax."⁷¹ The court's conclusion, as stated in its opinion, adhered "to the doctrine that where problems in the sphere of dual sovereignty are involved, legislation should receive a construction which permits both to function with a minimum of interference each with the other."⁷²

In a concurring opinion, District Judge Fee expressed the view that a tax on the liquidating sale here ordered by the court, whatever the form of the tax, was either "a tax on the process of the Court liquidating assets in accordance with constitutional power" or "a license fee required of a federal officer to make liquidation."⁷³ In either case, such a tax was void. According to him, under the conditions here present "neither enactments of the State of California nor decisions of state courts nor practices of state administrative bodies can burden or impede administration of acts relating to bankruptcy."⁷⁴

Prorating Federal Unemployment Taxes to Determine Priorities.

—The Federal Unemployment Tax Act provides, *inter alia*, that

[e]very employer . . . shall pay . . . for each calendar year . . . an excise tax, with respect to having individuals in his employ, equal to 3 per centum of the total wages . . . paid by him during the calendar year with respect to employment. . . .⁷⁵

The question as to whether the calendar year may be split for the

⁶⁹ California State Board of Equalization v. Goggin, 191 F.2d 726, 728 (9th Cir.), cert. denied, 342 U.S. 909 (1951).

⁷⁰ Id. at 729.

⁷¹ Id. at 730.

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ 53 Stat. 1387 (1939), 26 U.S.C. § 1600 (1946).

purpose of determining the priority status of taxes arising under that statute was resolved by the second circuit in a 1952 decision,⁷⁶ Judge Clark dissenting. The debtor had filed a Chapter XI⁷⁷ petition on November 14, 1947, and was continued as debtor in possession through September 1948. Federal unemployment taxes for 1947 were due on January 31, 1948. The United States claimed the entire tax for 1947 as an administrative expense under Section 64(a)(1).⁷⁸ The referee declined to give it that priority and gave it a fourth priority under Section 64(a)(4) as a tax legally due and owing to the United States.⁷⁹ The referee, however, did permit the United States to amend its claim so as to show the portion of the annual payroll tax due on wages paid out after November 14, 1947, while the debtor was in possession under the authority of the Chapter XI court. The district court⁸⁰ upheld the referee, and the Government appealed because there were insufficient funds to pay the 1947 taxes under the fourth priority of Section 64(a).

The majority of the appeals court was of the opinion that "[t]he Referee was . . . justified in denying priority to unemployment taxes levied on wages paid out before the Chapter XI petition was filed."⁸¹ The majority opinion acknowledged that state franchise taxes on the privilege of doing business accruing during bankruptcy proceedings are generally regarded as administrative expenses even though the company is in bankruptcy during only part of the taxable year. It distinguished the cases so holding from the one at bar on the following grounds: (1) that the continuation of the corporate debtor in possession is essential after reorganization, and nonpayment of franchise taxes in such cases might result in forfeiture of the franchise and thereby nullify reorganization; and (2) that state franchise taxes are generally based "upon the 'amount of capital stock within the state' or 'paid up capital and surplus'—in other words, upon bases that could not be reasonably apportioned over the taxable period."⁸² The federal unemployment tax "is certainly not a franchise tax on the privilege of doing business." More important, "the amount of the tax for any specific period is computable by simple arithmetic." As the majority opinion stated, "The mere fact that the tax is not due until the year's end does not detract from the fact that it is incurred in a readily ascertainable amount as the wages are paid

⁷⁶ *Pomper v. United States*, 196 F.2d 211 (2d Cir. 1952).

⁷⁷ 52 Stat. 905 (1938), 11 U.S.C. §§ 701-99 (1946).

⁷⁸ 66 Stat. 426 (1952), 11 U.S.C.A. § 104(a)(1) (1953).

⁷⁹ 52 Stat. 874 (1938), 11 U.S.C. § 104(a)(4) (1946).

⁸⁰ *In re Oceanic Ship Scaling Co.*, 100 F. Supp. 122 (E.D.N.Y. 1951).

⁸¹ *Pomper v. United States*, 196 F.2d 211, 213 (2d Cir. 1952).

⁸² *Id.* at 212.

out.⁸³ Since the annual tax could "be easily apportioned between pre-bankruptcy and post-bankruptcy wages," and since the majority could "find no policy of the tax statute disturbed by such apportionment," the majority correctly decided that "the unemployment tax must be treated the same as other regular business expenses of the debtor continuing throughout and apportionable between the pre-bankruptcy and post-bankruptcy periods of the year."⁸⁴

Judge Clark in his dissent expressed the view that the manifest legislative intent was that the tax is for the year and should not be apportioned. Credits allowed under the Federal Unemployment Tax Act point up the fact that the tax does not accrue on a day-to-day basis. As he saw the statute, there was

no suggestion anywhere of the unreal idea—viewing any business—that the employer becomes a new and different person, destroying the unitary character of this assessment, by the mere chance of filing a petition for arrangement.⁸⁵

According to him, the court was not at liberty to rewrite the statute, and in any event

the policy does not seem unfair. Here is a business still going and required to pay as a primary charge along with wages a tax thereon for the unemployed. To include in this limited tax with a specified ceiling per employee the total for the year as required to be assessed and paid by the statute, without refinements of confusing changes, does not seem unduly harsh.⁸⁶

The position of an employer-debtor continued in possession under Chapter X or XI is "for all practical purposes that of a trustee or receiver. . . ."⁸⁷ He is vested with all the title⁸⁸ possessed by a bankruptcy trustee appointed under Section 44 of the Act.⁸⁹ Thus the debtor does become a new and different person upon the filing of the arrangement petition, if continued in possession. In that situation, the case should be viewed as though a trustee had been appointed. That, however, should not be decisive on the question of the priority status of the tax. If the tax is severable an apportionment should be made. Severability was determined in the instant case on the basis of the tax statute. The result accords with the general philosophy

⁸³ Id. at 213.

⁸⁴ Ibid.

⁸⁵ *Pomper v. United States*, 196 F.2d 211, 214 (2d Cir. 1952).

⁸⁶ Ibid.

⁸⁷ *In re Walker*, 93 F.2d 283 (2d Cir. 1937).

⁸⁸ Bankruptcy Act § 342, 52 Stat. 909 (1938), 11 U.S.C. § 742 (1946); Bankruptcy Act § 70(a), 66 Stat. 429 (1952), 11 U.S.C.A. § 110(a) (1953).

⁸⁹ 30 Stat. 557 (1898), as amended, 11 U.S.C. § 72 (1946).

of the Bankruptcy Act that the rights of all persons are fixed and determined as of the date of the filing of the bankruptcy petition.⁹⁰

Judge Clark noted the *Amoskeag*⁹¹ and *Demos*⁹² cases in support of his dissent. The *Amoskeag* case is distinguishable. In that case, unemployment insurance taxes arising prior to the filing of the reorganization petition were not involved. The sole question was whether the debtor in possession, the temporary trustees and the permanent trustees should be treated as one continuing entity or three separate and distinct entities as to postreorganization taxes. The court very properly held that "the full amount of taxes, computed on the basis of services rendered to the debtor in possession and to the temporary and permanent trustees in liquidation"⁹³ should be paid. The *Demos* case is in accord with the views expressed by Judge Clark. That case, however, is unsound and should not be followed.

Taxes Withheld by Debtor in Possession: Administration Claims or Trust Funds.—Two recent cases⁹⁴ ruling that withholding taxes accruing while a debtor is continued in possession are entitled to treatment as trust funds, constitute a warning to courts and creditors alike that operations of a debtor in possession must be subject to the closest scrutiny. Failure to heed that warning may result in the depletion of the estate not only at the expense of general creditors but also of administration claimants given the highest priority in payment under the Act.

In one case⁹⁵ the United States sought to recover, as trust funds, certain moneys representing withholding and social security taxes by the debtor in possession under order of a court during reorganization proceedings. The Government relied upon the provisions of the Internal Revenue Code requiring that the taxes in question "so collected or withheld shall be held to be a special fund in trust for the United States,"⁹⁶ and also upon the federal statute providing that officers and agents conducting a business pursuant to an order of a United States court "shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation."⁹⁷ The specific funds sought to be

⁹⁰ 4 Collier, Bankruptcy ¶ 70.05 (14th ed. 1942).

⁹¹ Matter of Amoskeag Mfg. Co., 34 Am. B.R. (N.S.) 469 (D. Mass. 1937).

⁹² In re Demos Cafe, Inc., 5 CCH 1951 Fed. Tax Rep. ¶ 9,223 (W.D. Mich. 1950).

⁹³ Matter of Amoskeag Mfg. Co., 34 Am. B.R. (N.S.) 469, 473 (D. Mass. 1937).

⁹⁴ Hercules Service Parts Corp. v. United States, 202 F.2d 938 (6th Cir. 1953), affirming In re Hercules Service Parts Corp., 101 F. Supp. 455 (E.D. Mich. 1951); United States v. Sampson, 193 F.2d 154 (9th Cir. 1951).

⁹⁵ In re Hercules Service Parts Corp., 101 F. Supp. 455 (E.D. Mich. 1951), aff'd sub nom. Hercules Service Parts Corp. v. United States, 202 F.2d 938 (6th Cir. 1953).

⁹⁶ 53 Stat. 448 (1939), 26 U.S.C. § 3661 (1946).

⁹⁷ 28 U.S.C. § 960 (Supp. 1952).

recovered by the Government were not identified and no evidence was offered that the assets of the debtor were augmented by the payment.

The district court concluded that the Government's application should be granted. In so doing, the court seems to have relied primarily upon the decision of the second circuit in the *Rassner* case.⁹⁸ In the instant court's opinion, "The debtor in possession . . . was under statutory duty to withhold the taxes."⁹⁹ Thus it "became a representative or agent of the United States for the collection of such taxes," and it was "charged with the statutory duty of paying such funds to the United States."¹⁰⁰ When the debtor in possession collected the taxes here involved "a trust was immediately impressed upon such funds." It "had no proprietary interest in such funds," and the "funds were not a part of the assets owned by the debtor in possession."¹⁰¹ The withheld funds retained their trust character "although mingled with other assets by the debtor in possession." The district court acknowledged that generally the burden of showing wrongful mingling with the property of the wrongdoer rests upon the person seeking to follow that property. However, when as here that wrongful mingling has been shown, "the burden shifts to the wrongdoer to show that the owner's money or property had passed out of his hands, and in that respect his trustee in bankruptcy stands in the same position."¹⁰² Since the trustee could not establish that the money or property had passed out of his hands it followed that the Government was entitled to prevail.

The court of appeals agreed with the judgment of the district court. It not only relied upon the *Rassner* case but also upon a recent decision¹⁰³ of the Court of Appeals for the Ninth Circuit which it said was "even closer on the facts to the instant case." The appeals court recognized that

[i]t is the general rule that a trust cannot be impressed for the benefit of the *cestui que trust* unless the trust property is identified or the corpus of the trust is traced into some specific fund or thing into which the original trust property has passed in some form.¹⁰⁴

It was also of the opinion that the Revenue Act in question "did not dispense with this test for the recovery of diverted trust funds."

⁹⁸ *City of New York v. Rassner*, 127 F.2d 703 (2d Cir. 1942).

⁹⁹ *In re Hercules Service Parts Corp.*, 101 F. Supp. 455, 459 (E.D. Mich. 1951).

¹⁰⁰ *Id.* at 458.

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ *United States v. Sampsell*, 193 F.2d 154 (9th Cir. 1951).

¹⁰⁴ *Hercules Service Parts Corp. v. United States*, 202 F.2d 937, 940 (6th Cir. 1953).

See also *In re Stridacchio*, 107 F. Supp. 486 (D.N.J. 1952).

Nevertheless, reasoning from the premise that the debtor in possession while operating the business acted as an officer of the court and neglected to fulfill the obligation imposed upon it by statute and that under the Revenue Act the amount collected or withheld was made a special fund in trust for the United States, it concluded that "[s]ince the funds were diverted by an officer acting under the authority and control of the court the obligation of tracing the trust corpus does not exist."¹⁰⁵ The court of appeals did not consider this result unfair to general creditors. In its view "if restitution is made the creditors will receive no less than that to which they were originally entitled and that which they would have received if the officer of the law had performed his obligation."¹⁰⁶

In the second case,¹⁰⁷ withholding taxes, which had arisen during operations by a debtor in possession in a Chapter XI arrangement proceeding, were also involved. The debtor was adjudicated bankrupt and the assets were insufficient to pay in full the Chapter XI obligations of the debtor in possession. The Federal Government asked the court to hold that the assets in the trustee's hands were impressed with a trust in its favor to the extent necessary to pay its claim in full. On the ground that no tracing was necessary because the trust obligation arose while the debtor in possession was continuing operations under direction of the court, the appeals court decided that the Government's request should be granted. This court too, in making its determination, followed the decision in the *Rassner* case, finding the situation before it indistinguishable. In the instant case the debtor had deducted withholding taxes but had not accounted to the collector for such deductions. The bankrupt had carried on its Chapter XI operations at a heavy loss. During the course of the same it did not acquire any new property; it did not create a special fund for any of the moneys deducted as withholding taxes; and it did not "at any time during the operations have the money necessary to create such a special fund." Despite these facts, the court of appeals was of the opinion that equitable principles required the granting of the relief requested by the Government.

The *Rassner* case actually affords no support for either of the decisions discussed above. In that case, the City of New York filed a claim for sales taxes which had actually been collected by the debtor in possession during operation of business pursuant to court order. The collections were not segregated but were used in the business. Thus the assets of the estate were augmented by these collections.

¹⁰⁵ *Hercules Service Parts Corp. v. United States*, supra note 104 at 940.

¹⁰⁶ *Id.* at 941.

¹⁰⁷ *United States v. Sampsell*, 193 F.2d 154 (9th Cir. 1951).

Under the circumstances the court correctly held that "the trustee must restore the trust funds depleted during administration."¹⁰⁸ Since the city was equitably entitled to full payment the trustee was required to satisfy the claim from whatever funds were in his hands, "no matter where they came from."

In both of the recent cases deductions were made regularly. In neither, however, was there a finding that the debtor in possession actually had the moneys which were withheld. Indeed, in one,¹⁰⁹ the referee found that the debtor could not have set apart the tax moneys at any time during operations. Hence in fact the taxes were not collected in either case. Withholding in the sense that the amount involved is not given to the wage earner is not the equivalent of withholding in the sense that the money not given to the wage earner is in hand and available for payment to him or the taxing authority. Of course the court should not tolerate a breach of a statutory duty imposed upon the debtor in possession. It should subject the debtor in possession to liability for misconduct. The Government, however, should not get relief at the expense of general creditors and possibly administration claimants, unless such creditors and claimants have in some way contributed to the debtor's delinquency. Moreover, from a broad viewpoint, all the assets are a trust fund, at least for administration creditors, and the Government should not be singled out for preferential treatment. The taxing authorities should be restricted to their rights as administrative claimants and such rights as they may enjoy against the debtor in possession for breach of duty.

The United States District Courts for the Eastern and Southern Districts of New York have attempted to cope with the problem in a practical fashion. By rule they require, in Chapter XI proceedings, weekly reports setting forth "the amounts of the deductions for withholding and social security taxes and whether or not such deductions have been deposited in a special account. . . ."¹¹⁰ The court and creditors are thus able to determine from week to week whether the debtor in possession is discharging the obligations imposed upon him by statute.

Election of Trustee: Disqualification of Corporate Claimant.—

A recent decision¹¹¹ of the Court of Appeals for the Second Circuit seems to limit unduly the salutary restrictive provisions of Section

¹⁰⁸ *City of New York v. Rassner*, 127 F.2d 703, 705 (2d Cir. 1942).

¹⁰⁹ *United States v. Sampson*, 193 F.2d 154 (9th Cir. 1951).

¹¹⁰ Bankruptcy Rule XI-5 of the U.S. District Courts for the Southern and Eastern Districts of New York.

¹¹¹ *Schwartz v. Mills*, 192 F.2d 727 (2d Cir. 1951).

44(a) of the Bankruptcy Act¹¹² and thus tends to defeat the congressional objective. That section expressly provides that

the creditors of a bankrupt, exclusive of the bankrupt's relatives or, where the bankrupt is a corporation, exclusive of its stockholders or members, its officers, and the members of its Board of Directors or trustees or of other similar controlling bodies shall . . . appoint a trustee or three trustees of such estate. If the creditors do not appoint a trustee . . . the court shall make the appointment.

In the instant case, the referee, over objection, permitted a corporation, whose stock was owned by two shareholders who likewise owned all of the outstanding capital stock of the bankrupt, to vote a large claim. As a result, a deadlock occurred in the election and the appointment was made by the referee. The district court upheld the ruling of the referee, and the appeals court affirmed, Judge Frank dissenting.

Speaking for the majority, Judge Clark observed that the language of Section 44(a) was inapplicable to the claimant corporation, since it referred primarily to individuals and was limited to stockholders of the bankrupt. His view seemed to be that in the circumstances disclosed, the creditor should be denied the right to vote in the election of a trustee only where it would be appropriate to subordinate the claim. Subordination, according to Judge Clark, was "not mechanically automatic upon the showing of identity between the stockholders and officers of the claimant and debtor corporations";¹¹³ and he recalled that the court had "traditionally stressed the elements of fraud and actual injury to the debtor interests." The objecting creditor had "given no hint even of fraudulent conveyance, manufactured claim or mismanagement," and he had not registered his objection on the broad equity ground that the election was controlled by the bankrupt. Hence there was no evidence that subordination on equitable grounds was indicated, and it followed that the referee was right in permitting claimant to participate in the trustee's election.

In Judge Frank's dissenting opinion, Section 44(a) was aimed "to prevent those controlling the bankrupt to vote for a trustee." As he saw it the interpretation of the statute to include a twin corporation carries out the patent purpose of the 1938 amendment, *i.e.*, to disqualify persons with "too close a connection with the bankrupt to make it proper that their votes should be counted in the selection of the trustee."¹¹⁴

¹¹² 30 Stat. 557 (1898), 11 U.S.C. § 72(a) (1946).

¹¹³ *Schwartz v. Mills*, 192 F.2d 727, 729 (2d Cir. 1951).

¹¹⁴ *Id.* at 732.

In an earlier case,¹¹⁵ the same court had decided

that where—as here—the stockholders of a bankrupt corporation were identical with those of a creditor corporation, then, without any proof of either any kind of fraud or unfairness whatsoever, the claim of the creditor corporation had to be subordinated to those of all other creditors.¹¹⁶

Thus, the court had “‘pierced the corporate veil,’ holding that, in such a situation, the claim of the creditor corporation must be treated exactly as if it were held directly by the stockholders of that corporation.”¹¹⁷ Where voting only was an issue, in Judge Frank’s view, “Far less should be needed to penetrate such tissue-paper insulation” than was involved in the instant case.

The majority opinion declared that the rule of subordination which was enunciated in an earlier case “was not stated as an absolute rule of law, to be applied notwithstanding the injustice it might cause, as would be the case where the creditor corporation was itself insolvent and its own creditors thus prejudiced.”¹¹⁸ In the instant case, a petition was pending at the time to force the claimant corporation into insolvency. That fact undoubtedly influenced the majority in reaching its decision to uphold the referee who had refused to invoke the equitable powers of the bankruptcy court to deny the claimant corporation the right to vote.

The clear object of Section 44(a) is to prevent those, who had participated in the control of the bankrupt, from having a voice in the election of the trustee. Congress decided to make it unnecessary to inquire as to whether someone closely connected with the bankrupt should be allowed to vote his claim. It is enough if that person comes within the prohibition of the statute. Prior to the 1938 amendment of Section 44 there was a general rule that “however high the character of a proposed trustee may be the active interference of the bankrupt in his favor will . . . render him ineligible for appointment.”¹¹⁹ In the selection of a trustee, where the bankrupt is a corporation, Congress in effect has said that the officers, directors and stockholders of the bankrupt shall be treated as if they were the bankrupt, and accordingly denied the right to vote. In the *Brewery* case,¹²⁰ where the question of subordination was involved, Judge Frank, then speaking for the majority, stated that “[w]ith identical stockholders, we may regard the situation as if there had been no Realty Company

¹¹⁵ In re V. Loewer's Gambrinus Brewery Co., 167 F.2d 318 (2d Cir. 1948).

¹¹⁶ Schwartz v. Mills, 192 F.2d 727, 731-32 (2d Cir. 1951).

¹¹⁷ Id. at 732.

¹¹⁸ Id. at 729, 730.

¹¹⁹ 2 Collier, Bankruptcy 1652 (14th ed. 1940).

¹²⁰ In re V. Loewer's Gambrinus Brewery Co., 167 F.2d 318 (2d Cir. 1948).

and as if the Brewery Company were indebted directly to its stockholders."¹²¹ There, Judge Learned Hand, in a concurring opinion, expressed the view that on the factual situation, "beneficially considered, the same persons are both creditors and stockholders, when they have organized into two corporations under a single control."¹²²

A literal construction of the statute supports the conclusion reached by the majority. But such a conclusion is contrary to the spirit and purposes of the Act. Denial of the right to vote should not be equated with subordination. It should not be necessary to rest disqualification for voting purposes upon fraud or actual injury to the interest of the creditors. Much less should be needed to deny voting rights than to subordinate a claim. In the situation at bar, the stockholders of the bankrupt were equitably the creditors of the bankrupt and there was a unity of control. The separate corporate fiction should have been disregarded. This would have worked no injustice upon the creditors of the creditor corporation because they had no voice in the voting action taken by that corporation. The position taken by Judge Clark would be tenable if the creditors of the claimant corporation had determined the manner in which the claim of their debtor was voted. Since the claimant corporation was still under the control of the common stockholders, it should not have been permitted to vote its claim in the election of the trustee.

Trustee as Lien Creditor.—The strong arm clause of the Bankruptcy Act, Section 70(c),¹²³ gives the trustee a powerful weapon in his battle to recover assets for the bankrupt's estate. This clause is invoked so frequently that it is surprising to see it misapplied, as it was recently. In a case decided by the second circuit¹²⁴ a chattel mortgagee, in a state court, had obtained a judgment about eight weeks prior to the bankruptcy of the mortgagor through a replevin action, adjudging that he recover from the bankrupt and obtain title and possession to certain items of personal chattels embraced by the mortgage. Under applicable New York law¹²⁵ the mortgage was bad as against one small creditor for lack of prompt filing. In a per curiam opinion, the appeals court ruled that "one creditor who could attack it was enough to avoid the mortgage under Section 70, sub. c, of the Bankruptcy Act . . . against later creditors represented by the trustee."¹²⁶

¹²¹ *Id.* at 319.

¹²² *Id.* at 320.

¹²³ 30 Stat. 566 (1898), as amended, 11 U.S.C.A. § 110(c) (1953).

¹²⁴ *Zamore v. Goldblatt*, 194 F.2d 933 (2d Cir.), cert. denied, 343 U.S. 979 (1952).

¹²⁵ N.Y. Lien Law § 230; *Tooker v. Siegel-Cooper Co.*, 194 N.Y. 442, 87 N.E. 773 (1909).

¹²⁶ *Zamore v. Goldblatt*, 194 F.2d 933, 934-35 (2d Cir.), cert. denied, 343 U.S. 979 (1952).

The court was right in its conclusion that the trustee could, for the benefit of all creditors, take advantage of the invalidity of the mortgage as against one creditor. It was wrong, however, in resting its decision on Section 70(c). The trustee's status as a lien creditor arises as of the date of the commencement of proceedings and not as of a date anterior thereto, and does not give him the status of a simple contract creditor before that time. The mortgage was good as against creditors whose claims arose after its filing.¹²⁷

The trustee derived his right to avoid the mortgage through the actual creditor whose claim arose before the mortgage was filed and which claim was unpaid at bankruptcy. The trustee therefore proceeded under Section 70(e)(1) of the Act which provides that

[a] transfer made . . . by a debtor adjudged a bankrupt under this Act which, under any . . . state law applicable thereto, is fraudulent as against or voidable for any reason by any creditor of the debtor having a claim provable under this Act, shall be null and void as against the trustee of such debtor.¹²⁸

Without the derivative right conferred upon the trustee by Section 70(e), the trustee could not have successfully challenged the belated filing of the mortgage.

An illustration of the proper application of Section 70(c) and the wide scope of that section is supplied by a recent decision¹²⁹ of the fifth circuit. In that case, the bankrupt had purchased an automobile under a so-called conditional sales contract. The contract was not filed and after bankruptcy the bankrupt surrendered the car to the seller. The car was sold and the contest arose over the proceeds. The referee and district judge agreed that the seller should prevail. The latter, however, was of the opinion that the trustee would have won if he had shown the existence of an actual creditor.

The appeals court declared that by the plain wording of Section 70(c), which gives the trustee the status of a judicial lien creditor, "the trustee's rights are not dependent upon the actual existence of any such creditor."¹³⁰ Applicable Alabama law¹³¹ provided that a conditional sales contract, unless properly recorded, was void as against judgment creditors without notice thereof, and that chattel mortgages are inoperative against creditors without notice, unless recorded. Following the holding of the Court of Appeals for the Ninth Circuit in the *Sampsell* case¹³² and applying the applicable Alabama

¹²⁷ In re Myers, 24 F.2d 349 (2d Cir. 1928.)

¹²⁸ 30 Stat. 566 (1898), as amended, 11 U.S.C.A. § 110(e) (1953).

¹²⁹ McKay v. Trusco Finance Co., 198 F.2d 431 (5th Cir. 1952).

¹³⁰ Id. at 433.

¹³¹ Ala. Code tit. 47, § 131 (Supp. 1951); Ala. Code tit. 47, § 123 (1940).

¹³² *Sampsell v. Straub*, 194 F.2d 228 (9th Cir. 1951), cert. denied, 343 U.S. 927 (1952).

law, the court decided that the trustee in the instant case "was in the position of a judgment creditor with a lien as of the date of bankruptcy." The court did not mean that "judgment creditors without notice thereof" must necessarily be judgment creditors with a lien" but, in its opinion, possession of such lien cannot "detract from the rights of judgment creditors under that statute."¹³³ The trustee was in the position of a judgment creditor without notice. Therefore under Section 70(c) "the rights of the trustee were superior to those of a vendee under a conditional sales contract."¹³⁴

Treating the contract as a chattel mortgage, the trustee must also prevail. The court held that the term "creditors" as used in the Alabama chattel mortgage recording statute¹³⁵ means "subsequent and not existing creditors at the time of the execution and delivery of the mortgage," and that "a judgment speaks from its date, and is not evidence of the existence of the debt prior thereto."¹³⁶ Hence, applying Section 70(c), the court decided that the contract was inoperative against the trustee. Since the trustee had all of the rights, remedies and powers of the most favored creditor as of the date of bankruptcy the actual existence of a subsequent creditor was immaterial.

It is interesting to note that contrary to the position taken by the second circuit in the *Zamore* case,¹³⁷ the court here expressed the view that in case of a belated recording prior to bankruptcy, it may be that "the trustee would have to bring himself within the terms of Section 70, sub. e(1) of the Bankruptcy Act."¹³⁸ In this situation, as previously indicated in the discussion of the second circuit case, Section 70(c) would be inapplicable.

In the *Sampsell* case, the issue was whether a homestead exemption claim of property was valid against the trustee when the declaration of homestead was made and filed for record after the filing of the bankruptcy petition. Under applicable California law¹³⁹ the lien given to a judgment creditor who voluntarily recorded an abstract of his judgment prevailed over a subsequently recorded homestead claim.¹⁴⁰ The trustee, as to all property of the bankrupt, is deemed vested as of the date of bankruptcy with all the rights, remedies and powers of a creditor then holding a lien thereon by legal or equitable proceedings, whether or not such a creditor actually exists.¹⁴¹ Thus

¹³³ *McKay v. Trusco Finance Co.*, 198 F.2d 431, 433 (5th Cir. 1952).

¹³⁴ *Id.* at 434.

¹³⁵ Ala. Code tit. 47, § 123 (1940).

¹³⁶ *McKay v. Trusco Finance Co.*, 198 F.2d 431, 434 (5th Cir. 1952).

¹³⁷ *Zamore v. Goldblatt*, 194 F.2d 933 (2d Cir. 1952). See p. 606 *supra*.

¹³⁸ *McKay v. Trusco Finance Co.*, 198 F.2d 431, 435 (5th Cir. 1952).

¹³⁹ Cal. Civ. Code § 1241 (1949). See also Cal. Code Civ. Proc. Ann. § 674 (1953).

¹⁴⁰ *Schuler-Knox Co. v. Smith*, 62 Cal. App.2d 86, 144 P.2d 47 (1943).

¹⁴¹ 52 Stat. 881 (1938), as amended, 11 U.S.C.A. § 110(c) (1953).

the determination of the ultimate question of the allowance of the homestead exemption hinged on whether a lien obtained by the recording of an abstract of judgment was a lien obtained by legal or equitable proceedings. In its first opinion¹⁴² the court answered this question in the negative. In reaching that conclusion, the court stressed "the distinct and voluntary character of the act of the judgment creditor in recording the abstract of his judgment and the necessity for such voluntary and distinct action to change his status from that of general creditor to that of lienor."¹⁴³ The court was also influenced by the views of the California courts "that the recordation of an abstract of judgment should be distinguished from 'judicial proceedings' under California law."¹⁴⁴

On rehearing,¹⁴⁵ the court declared that it was re-examining the "question of the proper characterization of the lien obtained in California by recording a judgment." This re-examination resulted in the recognition by the court of the fact that the recordation of a judgment was "incidental to the judicial proceeding in the sense of a device to give a judgment particular additional effect." The possibilities of rational analysis pro and con were not enough to dispose the court to disturb its original decision, "for analysis of the words of Section 70, sub. c alone" did not make the issue clear to the court either way. These possibilities were sufficient, however, to make the issue doubtful. With the issue thus in balance, it was resolved by giving Section 70(c) a construction consistent with the construction of equivalent language used in Sections 3(a)(3)¹⁴⁶ and 67(a).¹⁴⁷ These two sections are complementary and "[t]heir purpose is . . . to implement a fundamental policy of maintenance of equality among general creditors after insolvency."¹⁴⁸ A reasonable construction of these "sections is that which includes a California judgment lien among liens obtained by 'legal proceedings,' even though voluntary recordation is the essential final step in its creation."¹⁴⁹ The court concluded that the policy of Section 70(c) "permits the inclusive conception of liens by legal proceedings which the policy of Sections 3, sub. a(3) and 67, sub. a requires."¹⁵⁰

The appeals court pointed out that the concept of Section 70(c)

¹⁴² *Sampsel v. Straub*, 189 F.2d 379 (9th Cir. 1951).

¹⁴³ *Sampsel v. Straub*, 194 F.2d 228, 230 (9th Cir. 1951).

¹⁴⁴ *Ibid.*

¹⁴⁵ *Sampsel v. Straub*, 194 F.2d 228 (9th Cir. 1951).

¹⁴⁶ 30 Stat. 546 (1898), as amended, 11 U.S.C.A. § 21(a)(3) (Supp. 1954).

¹⁴⁷ 30 Stat. 564 (1898), as amended, 11 U.S.C.A. § 107(a) (1953).

¹⁴⁸ *Sampsel v. Straub*, 194 F.2d 228, 231 (9th Cir. 1951).

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.*

is to give "the trustee such status as a diligent general creditor might have achieved but for the intervention of bankruptcy." Accordingly, on the basis of consistency in the construction of equivalent phrases appearing in the Bankruptcy Act, taken with the other arguments heretofore discussed, the court came to the conclusion that it should abandon the view to which it was persuaded on first argument and "hold that the California judgment lien, though perfected only by voluntary recordation, is a lien by legal or equitable proceedings within the meaning of Section 70, sub. c."¹⁵¹

The court was wrong in its first decision, and its reversal is most welcome news. The result of that first determination was to "weaken and impair the position and status of the trustee as a hypothetical lien creditor."¹⁵² The trustee's hand must be strengthened and not weakened, for with all the remedies available to him, his job of bringing into the estate assets which should in equity be distributed to the creditors generally is at best a difficult one. The good effects of the reversal have already been shown in the trustee's victory in the Alabama case discussed above¹⁵³ where the court expressed approval of the decision rendered here after rehearing.

Subordination of Claims.—The bankruptcy court will exert its equitable powers to postpone the payment of or subordinate the claim of an insider where the circumstances require such a result.¹⁵⁴ Subordination, however, does not follow as a matter of course because the claimant has a fiduciary relationship to the bankrupt, as was illustrated very nicely in a recent case.¹⁵⁵ The claimant was employed by the bankrupt as manager of one of its departments at a \$15,000 annual salary plus 50 per cent of the net profits of the department. About three months later, the sole stockholder of the bankrupt made claimant a director and general manager of the business at an annual salary of \$20,000 plus 15 per cent of the net profits of the company. Claimant did not receive any stock of the corporation. Some six months later new parties came into partial ownership of the corporation and plaintiff resigned as director but remained as general manager. Shortly thereafter claimant sought to resign as general manager but remained on at the insistence of the new owners who promised to put new capital into the business. About a year later, the corporation went into bankruptcy, claimant having resigned as general manager approximately two months prior thereto. Claimant then sought to recover

¹⁵¹ *Sampsell v. Straub*, 194 F.2d 228, 232 (9th Cir. 1951).

¹⁵² 1951 Annual Surv. Am. L. 522.

¹⁵³ See p. 451 *supra*.

¹⁵⁴ *Pepper v. Litton*, 308 U.S. 295 (1939).

¹⁵⁵ *McDonell v. Sampsell*, 193 F.2d 954 (9th Cir. 1952).

the difference between his base salary during the total employment and the amount of his drawings. Claimant had deferred this amount of salary until the end of each year pursuant to agreement among the executives of the corporation so that the corporation would have a greater current liquid capital. It was undisputed that claimant's earning capacity was at least equal to the salary to be paid to him by the bankrupt corporation.

On these facts the referee allowed the whole claim but subordinated it, and the district court affirmed. This in effect amounted to a denial of the claim since the assets were insufficient to pay all other general creditors. The referee found that claimant as a director "breached a fiduciary duty in failing to discharge his responsibility to provide for payment of the corporation's debts." The court of appeals held that "[t]here is no duty on the part of a director of an embarrassed corporation to cause it to be relieved of that embarrassment."¹⁵⁶ The director's duty "requires of him no more than to use his best efforts to accomplish that result" and there was no evidence in the case that the claimant did not so act. It therefore followed that the claimant had not "breached a fiduciary duty in failing to discharge his responsibility to provide for payment of the corporation's debt."¹⁵⁷

Another finding of the referee was that claimant's salary was "excessive in the light of the corporation's ability to pay it." Since claimant's earning capacity was equal to that which the corporation undertook to pay him, it could not be said that his salary was excessive. Indeed, as the court of appeals pointed out, "An embarrassed corporation owes a duty to its creditors to employ the best available manager to make its business succeed and pay off the creditors' claims."¹⁵⁸ That court very aptly pointed out also that if the referee's conclusion was valid its obvious effect

would be that no deeply embarrassed company would be able to employ any person whose ability and experience might make its business successful and able to meet all its obligations, save one who would be willing to take nothing for his services if they were not successful and the liabilities in bankruptcy exceeded the assets.¹⁵⁹

The referee had found the postponement of part of claimant's salary "kept the corporation in business longer than it otherwise would have been and permitted the accumulation of greater liabilities." As to this, the appeals court said there was "no evidence that the corporation was longer kept in business because of such postpone-

¹⁵⁶ Id. at 956.

¹⁵⁷ Ibid.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid.

ments," and that it could find "no evidence that the postponement of the salary payments was for any purpose other than to give the corporation a larger working capital."¹⁰⁰ In addition, the referee had found that claimant was not a joint venturer. According to the appeals court, "that his salary would be larger if this management were successful and the creditors paid off is no inequity to the creditors."¹⁰¹

In short, the court of appeals decided that none of the referee's findings of fact, which had been adopted by the district court, was supported by the evidence. Hence it rightly decided that the claim should not be subordinated.

Affirmative Relief against Claimant on Trustee's Counterclaim.—Recent decisions¹⁰² signal a trend toward the recognition of the jurisdiction of the bankruptcy court to enter an affirmative judgment against a claimant on a counterclaim asserted by the trustee. It has always been the law that the filing of a claim constitutes a consent by the claimant to the exercise of summary jurisdiction by the bankruptcy court to determine the validity of any and all defenses to the claim.¹⁰³ It was also agreed that a counterclaim could be used to defeat or diminish the claim.¹⁰⁴ There was, however, sharp disagreement on whether the bankruptcy court could go further and enter a judgment for any excess found to be due on the trustee's counterclaim. The question was not truly one of jurisdiction, that is of the power of the court to adjudicate the issues, but rather one of venue. Moreover, there is no lack of power in the bankruptcy court to enter judgments.¹⁰⁵

In 1935 the United States Supreme Court in the *Hillman* case¹⁰⁶ took the extreme position that in equity receivership proceedings a claimant submits to the jurisdiction of the court in regard to any counterclaims, as well as any defenses. The subject matter of the claim there asserted against the estate was cognizable in equity and the counterclaim was likewise an equitable one. The doctrine of this case was a sensible one but it constituted a radical departure from the views then entertained as to the jurisdiction of the court. The *Hillman* case was followed shortly thereafter by a fourth circuit

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² *Columbia Foundry Co. v. Lochner*, 179 F.2d 630 (4th Cir. 1950); *In re Solar Mfg. Corp.*, 200 F.2d 327 (3d Cir. 1952); *In re Semolina Macaroni Co.*, 109 F. Supp. 453 (D.R.I. 1952); *Conway v. Union Bank of Switzerland*, 204 F.2d 603 (2d Cir. 1953).

¹⁰³ See 1945 Annual Surv. Am. L. 787.

¹⁰⁴ *Ibid.*

¹⁰⁵ Bankruptcy Act § 2(a)(15), 30 Stat. 545 (1898), as amended, 52 Stat. 842 (1938), 11 U.S.C. § 11(a)(15) (1946).

¹⁰⁶ *Alexander v. Hillman*, 296 U.S. 222 (1935).

decision¹⁶⁷ in which it upheld the right of the bankruptcy court to enter an affirmative judgment where the counterclaim arose out of the same transaction that gave rise to the filed claim. The counterclaim in this fourth circuit case seems to have been legal and not equitable.

The full sweep of the equity rule enunciated in the *Hillman* case was then accepted by the United States District Court for the Western District of South Carolina. That court held in a bankruptcy case¹⁶⁸ that a judgment could be entered on independent claims of the bankrupt against the claimant. In 1945, the Court of Appeals for the Second Circuit and the United States District Court for the Southern District of California fell in line.¹⁶⁹ The former, in a railroad reorganization proceeding under Section 77, held that the rule of the *Hillman* case was applicable, and it recognized that the reorganization court had jurisdiction to enter an affirmative judgment against a claimant. The latter, reversing a referee who had held to the contrary, "expressed the opinion that the power of the bankruptcy court to determine the validity of a claim included not only objections aiming to defeat it, but also to recover for the estate any surplus owing the bankrupt."¹⁷⁰

Later, in the *Lochner* case,¹⁷¹ the fourth circuit, following its earlier decision,¹⁷² held that the trustee could obtain affirmative relief on a legal counterclaim asserted against the claim of a nonresident creditor for goods sold and delivered. The court saw a conflict between Section 23¹⁷³ and Section 68¹⁷⁴ of the Bankruptcy Act, and expressed the opinion that in adjusting this conflict

too much emphasis has . . . been placed upon the requirement of Section 23 that suits by the trustee shall be brought only where the bankrupt might have brought them if bankruptcy had not occurred . . . and too little weight has been given to the right of the trustee under Section 68 to avail himself of set offs and counterclaims where a creditor presents a claim against the estate.¹⁷⁵

In its judgment the purposes of Section 23 can be given adequate scope by applying it only when the trustee actually brings suit. There is no good reason to extend it to the situation where the trustee

¹⁶⁷ *Florance v. Kresge*, 93 F.2d 784 (4th Cir. 1938).

¹⁶⁸ *In re Gillespie Tire Co.*, 54 F. Supp. 336 (W.D.S.C. 1942).

¹⁶⁹ *Chase Nat. Bank of New York v. Lyford*, 147 F.2d 273 (2d Cir. 1945); *In re Mercury Engineering Co.*, 60 F. Supp. 786 (S.D. Cal. 1945).

¹⁷⁰ 1945 Annual Surv. Am. L. 788.

¹⁷¹ *Columbia Foundry Co. v. Lochner*, 179 F.2d 630 (4th Cir. 1950).

¹⁷² *Florance v. Kresge*, 93 F.2d 784 (4th Cir. 1938).

¹⁷³ 30 Stat. 552 (1898), as amended, 11 U.S.C. § 46 (1946).

¹⁷⁴ 30 Stat. 565 (1898), as amended, 52 Stat. 878 (1938), 11 U.S.C. § 108 (1946).

¹⁷⁵ *Columbia Foundry v. Lochner*, 179 F.2d 630, 633 (4th Cir. 1950).

himself is sued in effect in the bankruptcy court by a creditor who files a claim against the estate. The court could find nothing in the text of Section 68

which manifests an intention to subject the trustee to any restriction in the use of a set off that would not have applied to the bankrupt if sued before his adjudication; and since in such an event the bankrupt could have had an affirmative judgment against his adversary under the ordinary rules of procedure, the trustee should be entitled to the same advantage in winding up the estate.¹⁷⁶

There is no valid distinction between an equity receivership and a bankruptcy proceeding in regard to the problem here presented; and the court correctly observed that "[b]ankruptcy courts are essentially courts of equity for many purposes; and they sit as courts of equity in dealing with the claims of creditors and try them without the intervention of a jury."¹⁷⁷

In 1951 the *Nathan* case¹⁷⁸ was decided by the United States District Court for the Southern District of California. There objections were filed under Section 57(g) of the Act,¹⁷⁹ and the court decided that an affirmative judgment could be entered on the trustee's counterclaim that claimant had received preferences voidable under the Act. In this case, the court declared that the *Hillman* doctrine afforded no support for the exercise of summary jurisdiction by the bankruptcy court on a legal counterclaim. The court, however, found summary jurisdiction to exist on the theory of an implied consent to that jurisdiction and implied waiver of trial by jury resulting from the filing of the claim. It reasoned that the counterclaim could be used as a set off and that the determination of such set off on the merits would be *res judicata*. Thus in a subsequent jury action "all that would remain of the right to trial by jury would be the formality of entering the affirmative judgment."¹⁸⁰ In these circumstances, consent and waiver may be implied.

Late in 1952, the United States District Court for the District of Rhode Island affirmed a referee's order expunging a claim for illegality and allowing the trustee's counterclaim against the claimant for the balance unpaid on a stock purchase.¹⁸¹ No question seems to have been raised as to the jurisdiction of the bankruptcy court to enter an affirmative judgment. Also, in 1952, the problem reached the Court of Appeals for the Third Circuit.

¹⁷⁶ *Ibid.*

¹⁷⁷ *Id.* at 634.

¹⁷⁸ *In re Nathan*, 98 F. Supp. 686 (S.D. Cal. 1951).

¹⁷⁹ 30 Stat. 560 (1898), as amended, 11 U.S.C. § 93(g) (1946).

¹⁸⁰ See 1951 Annual Surv. Am. L. 519.

¹⁸¹ *In re Semolina Macaroni Co.*, 109 F. Supp. 453 (D.R.I. 1952).

In the third circuit case,¹⁸² a bank acting as indenture trustee had filed a proof of claim for services and expenses, another claim for a balance on an unsecured promissory note held by it individually, and a damages claim for breach of warranty made on the sale to it of the debtor's accounts receivable. It also filed its account as indenture trustee. The trustee objected to the claims and the accounting, and counterclaimed. He charged preferential payments, derelictions of duty, and requested affirmative relief.

The first question, the court said, was whether the bankruptcy court had summary jurisdiction over the subject matter of the counterclaims based on alleged preferential payments to claimant and the bank balance which claimant bank had appropriated. After a comprehensive analysis of the *Hillman*, *Nathan* and fourth circuit cases, the court affirmed the ruling of the district court upholding jurisdiction. In so deciding, the court stressed that the subject matter of the counterclaims arose out of the same transaction as the claim. The court then directed its attention to the charges of derelictions of duty. These involved profits made by the bank in the financing of accounts receivable and the bank's failure to earmark the proceeds of the sale of property embraced by the trust indenture. The court was of the opinion that the counterclaims stemmed directly from the same source as the claims for fees and breaches of warranty. In its view, the accounting of the bank was made under Section 212 of the Act¹⁸³ but

could have been directed under the bankruptcy court's inherent powers. In either instance, since the Bankruptcy Act does not otherwise provide, it must be governed by the law of trusts generally applicable to accountings, and the trustee may be surcharged for his derelictions.¹⁸⁴

The appeals court also rejected the argument that the claims for derelictions were personal to the debenture holders and could not be asserted by the trustee. It was satisfied that the action against the bankrupt was quasi in rem for the benefit of the trust. It had the closest possible relationship to the accounting of the bank, and the trustee was the proper person to press the claims.

During the past year the Court of Appeals for the Second Circuit¹⁸⁵ was confronted with the question whether a Chapter X reorganization court had summary jurisdiction to enter an affirmative judgment on a trustee's petition, in the nature of a counterclaim, to

¹⁸² *In re Solar Mfg. Corp.*, 200 F.2d 327 (3d Cir. 1952), cert. denied, 345 U.S. 940 (1953).

¹⁸³ 52 Stat. 895 (1938), 11 U.S.C. § 612 (1946).

¹⁸⁴ *In re Solar Mfg. Corp.*, 200 F.2d 327, 332 (3d Cir. 1952), cert. denied, 345 U.S. 940 (1953).

¹⁸⁵ *Conway v. Union Bank of Switzerland*, 204 F.2d 603 (2d Cir. 1953).

claims originally asserted by Swiss banks, when a bar order of the court had already put an end to such claims. A dividend had been paid to the banks upon bonds submitted to the trustee, but later that dividend was returned to the trustee under order of the court. A bar order was made by the court which was disregarded by the banks. Thereafter, the trustee asserted his counterclaims.

The court of appeals agreed with the trustee that the banks had become parties to the reorganization proceeding by claiming and actually receiving the dividend. As Judge Learned Hand stated,

The only interest of a creditor or shareholder in an insolvency proceeding is to recover his share of the assets, but by intervening he naturally exposes himself to every defence that the insolvent may have to his claim, including set-offs or counterclaims. . . .¹⁸⁶

Therefore "the notices served under the Trustee's petition . . . would have been an equivalent of personal service upon 'The Banks,' if at that time they had been claimants, as creditors of the Debtor."¹⁸⁷ The Banks, however, "had ceased to be such claimants before the Trustee's petition . . . was filed, and . . . it was no longer possible to obtain jurisdiction *in personam* over them."¹⁸⁸ The court of appeals accordingly affirmed the order of the district court dismissing the trustee's petition and counterclaims.

The appeals court made it clear that its decision would have been otherwise had the bar order not been made. And it pointed out that it was not too late—so far as concerned the continued jurisdiction of the reorganization court—to consider vacating its prior orders regarding the banks. It warned, however, that it expressed no opinion as to whether personal jurisdiction, having been lost, would be regained if the reorganization court reinstated the banks.

In saying that an affirmative recovery under the counterclaims would have been permitted but for the bar order, Judge Hand relied entirely on the *Hillman* case. As stated by him, under the doctrine of that case "it does not matter whether the creditor's claim is valid; the only relevant inquiry is whether he is a claimant when the counterclaim is filed."¹⁸⁹ The justification for the doctrine, according to him, "is reasonably apparent." It is stated as follows:

It is common ground that the counterclaim may be used as a setoff against the claim, and that involves a decision upon its merits. If, however, it did not also involve its enforcement in full, the Debtor would be forced to split his claim, recovering enough of it in the insolvency proceeding to cancel the claim, but being obliged to seek out

¹⁸⁶ Id. at 606-07.

¹⁸⁷ Id. at 607.

¹⁸⁸ Ibid.

¹⁸⁹ Ibid.

the creditor where he could get personal jurisdiction over him in order to recover the remainder. Since the decision in the insolvency proceeding would conclusively settle all the facts, to insist upon an independent action would do nothing more than to raise a formal obstacle to the collection of a claim, already adjudicated.¹⁹⁰

The *Hillman* doctrine is a sound one and it ought to be extended to every bankruptcy case where the trustee is asserting a counterclaim that could have been asserted by the bankrupt in the absence of bankruptcy. It avoids multiplicity of actions and relieves the trustee of the necessity of seeking out the claimant to institute a plenary action when the issues have already been determined conclusively. The claimant should not be permitted to challenge the trustee's conduct in the bankruptcy proceeding and compel the trustee to sue him elsewhere. When the trustee's objection is under Section 57(g) of the Act, an affirmative judgment should not be entered, however desirable for the estate such a judgment might be. The trustee's counterclaim under Section 57(g) would not have been available to the bankrupt and would not have arisen until the bankruptcy petition was filed. The *Hillman* case is no authority for an affirmative judgment under Section 57(g) and to grant such judgment would be contrary to the plain language of that section.

Priority Status of NLRB Back-Pay Award.—The decision of the United States Supreme Court in *Nathanson v. NLRB*¹⁹¹ resolves the conflict as to whether, for the purposes of priority under Section 64(a) of the Bankruptcy Act,¹⁹² a back-pay award of the NLRB shall be treated as wages or shall be deemed a debt owing to the United States, by holding in favor of the former. Thus a back-pay award is entitled to a second priority in payment under Section 64(a)(2)¹⁹³ to the extent of \$600, if it is earned within three months before bankruptcy.

In the *Nathanson* case the NLRB "ordered the bankrupt to pay certain employees back pay which they had lost on account of an unfair labor practice of the bankrupt." Four months later, an involuntary bankruptcy petition was filed. Thereafter, the Court of Appeals for the First Circuit made a decree enforcing the Board's order. The NLRB filed a proof of claim in the bankruptcy proceeding for the back pay, which was disallowed by the referee. The district court reversed and allowed the claim.¹⁹⁴ It held that the final decision on liability by the NLRB, a quasi-judicial agency, was a judgment

¹⁹⁰ Ibid.

¹⁹¹ 344 U.S. 25 (1952).

¹⁹² 30 Stat. 563 (1898), as amended, 11 U.S.C.A. § 104(a) (1953).

¹⁹³ 30 Stat. 563 (1898), as amended, 11 U.S.C.A. § 104(a)(2) (1953). *Nathanson v. NLRB*, 344 U.S. 25 (1952).

¹⁹⁴ *In re Mackenzie Coach Lines, Inc.*, 100 F. Supp. 489 (D. Mass. 1951).

within Section 63(a)(1) of the Act¹⁹⁵ and therefore provable and was a claim entitled to priority under Section 64(a)(5)¹⁹⁶ as a debt owing to the United States. The court of appeals affirmed.¹⁹⁷ That court was of the opinion that the district court was right in its conclusion that the Board's order was a judgment under Section 63(a)(1), with the reservation, however, that the order was merely interlocutory as to the extent of the obligation on the back-pay issue. It also concurred in the view of the district court that the claim was entitled to priority under Section 64(a)(5). The Supreme Court granted certiorari¹⁹⁸ because of a conflict on the question of priority between that decision and *NLRB v. Killoren*.¹⁹⁹

The Supreme Court, with Justices Jackson and Black dissenting, decided that the NLRB was "a creditor as respects the back pay awards," and that the Board's claim was "provable as a debt founded upon an 'implied' contract within the meaning of § 63, sub. a(4),"²⁰⁰ as a liability based on quasi contract. It held, however, that the claim was not a debt due to the United States and thus did not come within Section 64(a)(5). The claim was entitled to priority only if it came within the purview of Section 64(a)(2), which it did not. In summary, therefore, the majority of the Supreme Court agreed with the court of appeals that the claim was provable by the Board but disagreed with the ruling on the priority of the claim.

It was argued that because the NLRB was an agency of the United States any debt owed to it was a debt owing to the United States under Section 3466 of the Revised Statutes,²⁰¹ which in turn gave priority under Section 64(a)(5). This argument was rejected by the majority, which emphasized the point that the priority granted by Section 3466 was for the purpose of assuring an adequate public revenue, and that feature was not present in the case before it. In the *Bramwell* case,²⁰² priority had been allowed to a claim of the United States for Indian moneys. The majority distinguished that case from the one at bar on the ground that the *Bramwell* case rested "on the status of the Indians as wards of the United States . . . and the continuing responsibility which it has for the protection of their interests."²⁰³ It refused to "extend that reasoning so as to give priority

¹⁹⁵ 30 Stat. 562 (1898), as amended, 11 U.S.C.A. § 103(a)(1) (1953).

¹⁹⁶ 30 Stat. 563 (1898), as amended, 11 U.S.C.A. § 104(a)(5) (1953).

¹⁹⁷ *Nathanson v. NLRB*, 194 F.2d 248 (1st Cir. 1952).

¹⁹⁸ *Nathanson v. NLRB*, 343 U.S. 962 (1952).

¹⁹⁹ 122 F.2d 609 (8th Cir. 1941).

²⁰⁰ *Nathanson v. NLRB*, 344 U.S. 25, 27 (1952).

²⁰¹ 31 U.S.C. § 191 (1946).

²⁰² *Bramwell v. United States Fidelity & Guaranty Co.*, 269 U.S. 483 (1926).

²⁰³ *Nathanson v. NLRB*, 344 U.S. 25, 28 (1952).

to a claim which the United States is collecting for the benefit of a private party."²⁰⁴

In the judgment of the majority, the policy of the National Labor Relations Act is fully served by recognizing the back-pay claim as one that is provable under Section 63(a)(4),²⁰⁵ and it declared that the question whether the back-pay claim "should be paid in preference to other creditors is a question to be answered from the Bankruptcy Act." The policy of the Bankruptcy Act is to limit wage claims as provided in Section 64(a)(2), and the Court would be departing from that policy, according to the majority, if it "granted the priority to one class of wage claimants irrespective of the amount of the claim or the time of its accrual."²⁰⁶ It would also violate the theme of the Bankruptcy Act that there is "equality of distribution."

The dissent argued that since the claim was one which could be proved in bankruptcy by the Board as an agency of the United States, "The same reasoning which enables the Government to assert the claim would seem to enable it to assert the priority."²⁰⁷ As Justices Jackson and Black saw it, there is "nothing in the policy of the Bankruptcy Act which precludes these claims, allowed in the Government's right and in its name from sharing in the Government's general priority."²⁰⁸ Back-pay awards are the equivalent of wages but the beneficiaries thereof are seldom able to bring themselves within "the three-months time limitation for wage priority because of the lag occasioned by Labor Board proceedings to establish the unlawfulness of their discharge by the employer."²⁰⁹ In their view, it is not "inappropriate to consider the relation of the Government to the wronged laborer established by the Labor Relations Act as analogous to the Government's wardship toward Indians, found to warrant invocation of its priority"²¹⁰ in the *Bramwell* case.

The majority decision is the correct one under the Bankruptcy Act. Back-pay awards are clearly wages or their equivalent. They do not create a debt to the United States. The Board, in collecting the awards, acts as agent for the beneficiaries. The Government has no financial interest in the awards. Nonpayment thereof entails no financial loss to the Government. It loses nothing if priority under Section 64(a)(5) is denied. The priority given a debt to the United States is unlimited as to time of accrual and amount. To give such

²⁰⁴ Ibid.

²⁰⁵ 30 Stat. 562 (1898), as amended, 11 U.S.C.A. § 103(a)(4) (1953).

²⁰⁶ *Nathanson v. NLRB*, 344 U.S. 25, 29 (1952).

²⁰⁷ Id. at 31.

²⁰⁸ Ibid.

²⁰⁹ *Nathanson v. NLRB*, 344 U.S. 25, 32 (1952).

²¹⁰ Ibid.

a priority to back-pay awards would be unfair not only to other employees but also to general creditors. As the majority opinion pointed out, when bankruptcy occurs "the contest now is no longer between employees and management but between various classes of creditors."²¹¹ It is true that because of the unavoidable delay in decision, few awards may qualify for priority under Section 64(a)(2), as now construed. That is wrong. Relief should be granted by legislation preserving the spirit and philosophy of Section 64(a)(2) or the courts should construe back-pay awards to be "earned" within the meaning of that term as used in Section 64(a)(2) when the enforcement order of the court of appeals is entered.

²¹¹ *Nathanson v. NLRB*, 344 U.S. 25, 28 (1952).

BANKING AND NEGOTIABLE INSTRUMENTS

LAURENCE P. SIMPSON

AN ENORMOUS volume of literature on the proposed Uniform Commercial Code was published during the current year, particularly relating to the articles on negotiable instruments, bank collections, and letters of credit.¹ This was to be expected, since the question of whether the Code should or should not be adopted has become an immediate one in many states, and critical study of its provisions is now going on. An unusually large number of cases under the Negotiable Instruments Law were decided in the period, and many law review articles of importance appeared. A valuable annotation collecting the cases on a bank's lien on collection paper should be mentioned;² and also another on insanity of drawer or indorser as a defense against a holder in due course.³

Forged or Unauthorized Indorsement: Drawee v. Holder.—When a drawee pays a check under a forged or unauthorized indorsement, its right to recover the payment from the holder who collected the check is quasi-contractual—restitution of money paid under mistake of fact.⁴ A limitation on such right of recovery exists, however, when the drawee after learning of the forged indorsement fails to give prompt notice, and as a result the holder bank, which collected, suffers damage. Both delay and resultant injury are required before the drawee's right of recovery will be barred; and both must be established and not left to conjecture.⁵ In most instances there will be prior solvent indorsers or transferors for value, and their liability on the warranty of title which runs to the holder bank precludes the showing of injury to such holder, and permits the drawee's recovery despite its delayed notice.⁶ However, even if there are such prior parties, injury to the collecting holder will exist and can be shown where, by force of a local statute, their liability is conditioned upon notice of the

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¹ Beutel, *The Proposed Uniform [?] Commercial Code Should Not be Adopted*, 61 Yale L.J. 334 (1952); Note, *Warranties to a Payor or Acceptor under the Uniform Commercial Code* § 3-417(1), 27 Ind. L.J. 561 (1952); Note, *Stop Payment and the Uniform Commercial Code*, 28 Ind. L.J. 95 (1952); Note, *Allocation of Losses from Check Forgeries under the Law of Negotiable Instruments and the Uniform Commercial Code*, 62 Yale L.J. 417 (1953). Several series of articles on the Code appeared as follows: 17 Albany L. Rev. 1 (1953); 14 Ohio St. L.J. 1 (1953); 32 Ore. L. Rev. 25, 97, 228 (1952-53); [1952] Wis. L. Rev. 230.

² Note, 22 A.L.R.2d 470 (1952).

³ Note, 24 A.L.R.2d 1380 (1952).

⁴ See cases cited in Britton, *Bills & Notes* § 139 nn.1, 2 (1943).

⁵ *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943).

⁶ *Ibid.*

forged indorsement within a stated time and the delay in giving notice extends beyond the time.

In a current case,⁷ the Federal Government mailed its check drawn on the Treasury to a person having the same name as the intended payee. Thus the Government was both drawer and drawee of the check. The person receiving the check made an unauthorized indorsement by signing his own name⁸ and cashed it at an intervening bank, which indorsed for value to defendant bank, and defendant collected the check from the Treasury. After more than a year's delay in notifying defendant of the forged indorsement, the Government brought its action for restitution of the money paid. A local statute conditioned any right of recovery on written notice of the forged or unauthorized indorsement within a year of the payment.⁹ Yet the court permitted a recovery, holding that the local statute was, under the *Clearfield* case,¹⁰ inapplicable to government checks. It also held that the Government was not negligent so as to preclude its recovery by mailing the check to a person with the same name as the intended payee, contrary to the majority rule;¹¹ and, finally, that the defendant bank suffered no loss by the delay in giving notice, since the prior solvent banks were available for its indemnification. The implication is clear that in a subsequent action by defendant against a prior bank for breach of warranty of title to the check the local statute limiting the right to one year would be inapplicable. But, as pointed out in the dissenting opinion, in such action between private parties in the state courts, the local law, rather than the federal law, applies. Thus it is not apparent how the defendant bank could recover. If not, substantial injury has resulted from the Government's long delay in giving notice, and under federal law recovery by the Government should have been precluded.

Payment without Indorsement: Drawer v. Drawee.—Where a bank pays to the payee an order check without requiring the payee's indorsement the payment is in accordance with the drawer's order, and the payee's indorsement, or lack of it, is operative only on the question of proof of the payment.¹² If the drawee pays a third party in possession of the unindorsed check, it assumes the risk of the third party's title and right to receive payment; but even here if the money is

⁷ *Fulton Nat. Bank v. United States*, 197 F.2d 763 (5th Cir. 1952), 37 Minn. L. Rev. 201 (1953).

⁸ Normally held to be a forged indorsement. *United States v. National City Bank*, 28 F. Supp. 144 (S.D.N.Y. 1939).

⁹ Ga. Code Ann. § 13-2052 (Supp. 1951).

¹⁰ See note 5 *supra*.

¹¹ *Market Street Trust Co. v. Chelton Trust Co.*, 296 Pa. 230, 145 Atl. 848 (1929); *Keck v. Browne*, 314 Ky. 151, 234 S.W.2d 183 (1950).

¹² *Osborne v. Gheen*, 136 U.S. 646 (1890).

turned over to the payee, the payment having reached the person who as against the depositor has the right to receive it, the depositor cannot complain. In a current case¹³ plaintiff depositor issued a \$50,000 check on the Chase Bank to the order of a partnership in purchase of an oil lease which he received. The check was paid by the drawee to a third party without indorsement of the payee's name, but the proceeds were turned over to the payee. Two years later the depositor sued the drawee for a recredit, alleging unauthorized payment and the defense of fraud by the payee in inducing the check. The court held that since the payee received the money the situation was the same as though payment had been made directly to the payee, and that since the payee was the one intended by the drawer to receive the funds, the payment was in accordance with the drawer's order and he is not entitled to a recredit.

Payment under indorsement of a check by a nonexistent payee is presumably the same as payment without indorsement. In another current case¹⁴ the plaintiff depositor drew a check to the order of a nonexistent corporation for an intended loan to the business. Plaintiff lacked knowledge that the business was not as yet incorporated, so the check was not bearer paper as payable to a nonexistent payee.¹⁵ Drawee paid the check, and the funds were used in the business. Since they reached and were used by the business intended by the drawer, the payment by the drawee was in accordance with the drawer's intention, so he may not obtain a recredit on the ground that the act of the drawee was unauthorized.

Payment of checks bearing an unauthorized signature of the drawer enables the bank to stand on the charge and reduces the depositor's credit balance accordingly where the depositor has received the benefit of the payments from his account. In an Illinois case¹⁶ defendant bank paid out to creditors of the corporate depositor the entire balance in the account, on checks bearing the signature of one corporate officer only, whereas it was authorized to pay only checks on which the signatures of two specified corporate officers appeared. Since the account was set up to distribute the fund to corporate creditors, and since this was accomplished by the payments made as intended by the depositor,

¹³ *Gilbert v. Chase Nat. Bank*, 108 F. Supp. 229 (S.D.N.Y. 1952).

¹⁴ *Kushelewitz v. National City Bank*, 202 F.2d 588 (2d Cir. 1953).

¹⁵ In *Callaway v. Hamilton Nat. Bank*, 195 F.2d 556 (D.C. Cir. 1952), 57 Dick. L. Rev. 168 (1953), drawer's lack of knowledge that the payee named was not yet incorporated was held to prevent the paper from being payable to bearer as payable to a fictitious or nonexistent person, such fact not being "known to the party making it so payable" within Negotiable Instruments Law § 9(3).

¹⁶ *Kores Carbon Paper Co. v. Western Office Supply Co.*, 349 Ill. App. 208, 110 N.E.2d 461 (1953).

a judgment creditor could no more challenge the propriety of the payments than the depositor could.

Finance Company as Holder in Due Course.—A noticeable trend in judicial decision over the past ten years is evidenced by a growing minority rule under which a finance company is denied the status of a holder in due course so as to let in defenses such as breach of warranty, failure of consideration, or fraud in the inducement, in conditional sale installment purchases of commodities from dealers.¹⁷ The basis of the rule is that where the finance company is so closely connected with the transaction out of which the note it purchases arose, counseling and aiding the dealer-payee, it is practically a party to the agreement, and cannot be regarded as a purchaser in good faith of the instrument on which it seeks recovery. It is said to be, in effect, in charge of credit management of the dealer's business and accounts, and thus an integral part of his business. It is therefore outside the category of good faith purchasers of negotiable instruments.¹⁸ In a current decision¹⁹ the Florida court adopted the close-connection doctrine. Defendant bought a deepfreeze on fraudulent representations made by the dealer and salesman, and signed a conditional sale contract to which a negotiable note for \$1,400 was attached by perforation. The dealer immediately assigned the contract and indorsed the note to plaintiff finance company. When the freezer failed to work the defendant rescinded the contract and tendered back the freezer. In denying recovery on the note, the Florida court stated that the general buying public requires protection against unscrupulous dealers, and that the finance company is better able to bear the risk of the dealer's insolvency and in a better position to protect its interests against fraudulent dealers than the buyer.

Usury.—In absence of express agreement, a note or check given in payment of a debt is not of itself operative as a present discharge. The payment is conditional, and the debt is paid only when the note or check is paid. Similarly, a note at a later maturity, given in substitution for an existing note, is presumptively a renewal note. Thus if the renewal note is usurious, whereas the original note was not, since the renewal note does not effect payment of the prior note without an express agreement between the parties that it should, the payee and holder are entitled to sue and recover on the original note.²⁰

¹⁷ See *Commercial Credit Co. v. Childs*, 199 Ark. 1073, 137 S.W.2d 260 (1940); *Commercial Credit Corp. v. Orange County Machine Works*, 34 Cal.2d 766, 214 P.2d 819 (1950).

¹⁸ *Buffalo Industrial Bank v. DeMarzio*, 162 Misc. 742, 296 N.Y. Supp. 783 (City Ct. 1937).

¹⁹ *Mutual Finance Co. v. Martin*, 63 So.2d 649 (Fla. 1953).

²⁰ *Herold v. Silston*, 279 App. Div. 926, 110 N.Y.S.2d 880 (2d Dep't 1952).

Statutes which deny to a corporation the defense of usury are not designed for the purpose of validating usurious loans actually intended to be made to an individual, even though in form the loan is made to a corporation organized by the individual borrower.²¹ If pursuant to a corrupt agreement for a usurious loan, and at the insistence of the lender the intended borrower forms a corporation to which the loan is ultimately made, the corporation is not then the real borrower but serves merely as a cloak to cover the transaction as an evasion of the usury laws. If, on the other hand, the lender does not participate, except to the extent of making a loan at higher than legal rate of interest to a corporate applicant, the statute applies to deny the defense of usury, or to deny the right of the individual to recover usurious payments made on the loan to the corporation.²² In a current New Jersey decision²³ it was held that conflicting evidence as to the lender's participation presented a jury question, so it was error requiring reversal to grant a judgment for the recovery of usurious bonuses.

Demand Note: Statute of Limitations.—A simple demand note is due the moment it is issued and usually the statutory period of limitations begins to run from that date. However, by antecedent or contemporaneous agreement between the parties it may appear that their intention was that only default by the debtor as to interest or installment of principal should give the creditor the right to demand the entire sum. Since a note does not purport to be a total integration, parol evidence of such antecedent or contemporaneous agreement is admissible. In a current case the Mississippi court applied these principles to deny the validity of the plea of the statute of limitations in an action on a demand note begun twenty years after date of issue of the note.²⁴ At the time the note was signed, an agreement was entered into by which the creditor promised that the principal sum would not be demanded so long as the debtor kept up his payments of \$125 a month, but that in the event of default the creditor "could declare all of her indebtedness at once due and payable" by giving ten days written notice.

Bank's Set-off of Deposit against Depositor's Note.—A bank which holds the note or other matured debt of a depositor may at any time set it off against the bank's liability on the balance of the general account of the depositor. However a bank cannot set off a general deposit against a debt of the depositor where the debt is not matured.

²¹ *Anam Realty Co. v. Delancey Garage*, 190 App. Div. 745, 180 N.Y. Supp. 297 (1st Dep't 1920); *Sherling v. Gallatin Improvement Co.*, 145 Misc. 734, 260 N.Y. Supp. 229 (Sup. Ct. 1932).

²² *Jenkins v. Moyse*, 254 N.Y. 319, 172 N.E. 521 (1930).

²³ *Gelber v. Kugel's Tavern, Inc.*, 10 N.J. 191, 89 A.2d 654 (1952).

²⁴ *Belhaven College v. Downing*, 216 Miss. 299, 62 So.2d 372 (1953).

But if the debt is evidenced by a note containing a provision which gives to the holder an absolute right to accelerate maturity "at any time it deems itself insecure," the Alabama court held in a current case that the bank could effectively make the set-off after service of garnishment by a judgment creditor of the depositor.²⁵ Although the rights of the garnisher are to be determined as of the date of service of the writ, and although at that time the bank had not accelerated and made the set-off, yet the rights of a garnisher are no higher than the rights of the judgment debtor. Had the latter sued the bank for his balance the bank could have made the set-off after service of summons, so it can do the same thing against plaintiff garnisher.

Effect of Presumptions as to an Issued Check.—Where after issuance of a check the drawer dies and on presentment the bank refuses payment on the ground that the depositor's death terminates authority to pay to any third party, the payee of the check has no right against the drawee bank. A check is not of itself an assignment of the fund on deposit, and the check has not been certified. However, under the Negotiable Instruments Law where a check is in the possession of the payee-holder there is a presumption both of delivery²⁶ and that such delivery was for consideration.²⁷ The presumptions obtain until rebutted. Thus the payee of the check can establish his claim against the estate of the decedent drawer by introducing the check in evidence and proving the genuineness of the drawer's signature. Without rebuttal of the presumptions, disallowance of the claim by the administrator is improper.²⁸

²⁵ State Nat. Bank v. Towns, 36 Ala. App. 679, 62 So.2d 606 (1953).

²⁶ Negotiable Instruments Law § 16.

²⁷ Id. § 24.

²⁸ So held in *In re Kolben's Estate*, 203 Misc. 1012, 120 N.Y.S.2d 812 (Surr. Ct. 1953).

SALES

RAY GARRETT, JR.

THE UNIFORM Commercial Code has already become law in one state, Pennsylvania,¹ and the adoption by a state of such commercial importance must be regarded as a significant victory. It is, of course, only a battle and not the war, and its effect was somewhat countered by the report of an unofficial New York committee which was hardly friendly toward the Code, making the chilling recommendation that it be subjected to further study.²

As suggested by State Senator Walker of Pennsylvania,³ the Code is full of compromises on disputed issues, but the affected interests were generally well represented and thoroughly heard. It is unlikely that more time will produce better compromises on a national basis. Language can be quibbled over indefinitely. On the whole one cannot expect that further consideration will greatly improve the Code, and such improvement as it should make would be at the expense of uniformity.

What "further study" can achieve is a local victory by an interest which was not able to prevail on a national level, and one must expect those interests which regard themselves as adversely affected by the Code to make the attempt. It is easy for a nonparticipant to become impatient with this process of rearguing the national compromise in each state, but there is no reasonable substitute for it. Even a zealot must agree that there is always the possibility that New York does not fully understand the situation in, for example, Mississippi, and that the difference transcends the utility of uniformity. One can only hope that in the local debates the controversy concentrates on the main issues and that local committees and legislatures resist the temptation to engage in the endless game of improving the drafting.

Meanwhile valuable studies of all or parts of the Code continued

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¹ Pa. 1954, Act. No. 1, eff. July 1, 1954.

² Report of joint committee consisting of Committee on Uniform State Laws of the Association of the Bar of the City of New York and the Special Committee on the Uniform Commercial Code of the New York State Bar Association, January 20, 1953. The committee recommended a publicly financed study showing changes in present law, followed by public hearings "at which affected interests will be given an opportunity to be heard." The Governor later announced that the State Law Revision Commission would study the Code.

³ Speech by John M. Walter of Allegheny County to the Pennsylvania Senate, quoted at length in Malcolm, *The Proposed Uniform Commercial Code*, 8 Business Law. 16, 21-24 (April 1953).

to appear and some are cited below.⁴ Committees have been appointed to study and make recommendations on the Code in many states. Their reports can be expected in time for the 1955 legislative sessions.

Passing of Property.—Few propositions are as well settled as that which protects the owner of goods against the purchaser from a bailee. No matter how innocently the purchaser may believe that the purported seller has title, and no matter how much he may have paid in good faith, the owner can recover from the purchaser unless he has given the bailee authority to sell, or he is responsible for creating in the minds of third persons the appearance of the bailee's authority to sell, or a factor's act applies. Phrased otherwise, the mere entrusting of another with possession of a chattel does not give the bailee power to pass good title even to a bona fide purchaser, but something more, some indicia of ownership in addition to possession will give such power.

These elementary principles were applied in routine fashion in two cases during the past year,⁵ but in another, *Zendman v. Harry Winston, Inc.*,⁶ the principles seem to have been confused.

The case involved title to a diamond ring which defendant Winston entrusted to an auctioneer, Brand, under written terms that title should remain in Winston. In spite of this Brand auctioned the ring off to the plaintiff for \$12,500, and soon went bankrupt. There was evidence that for several years Winston had delivered articles to Brand under a similar agreement, and yet had accepted the proceeds from sales by Brand without insisting on the terms of the prior agreement. It also appeared that Brand had kept the ring in his showcase among articles for sale, that Winston's agent knew this, and that no objection had been made. Finally the plaintiff, before buying the ring, was not shown to have had any reason to know of the terms of the bailment, of the past transactions between Winston and Brand, or of the ring's presence in the showcase.

The Court of Appeals held for the plaintiff. The past transactions and the failure to object to the display in the showcase were enough to preclude Winston from denying Brand's authority to sell. The reliance of the plaintiff was reasonable because the "public thus regards the entrusting of goods to an auction house as tantamount to the entrusting of the power to sell such goods."⁷

⁴ A Symposium of the Proposed Uniform Commercial Code, 17 Albany L. Rev. 1 (1953); Uniform Commercial Code in Ohio—a Symposium, 14 Ohio St. L.J. 1 (1953); Uniform Commercial Code—the Effect of its Adoption in Tennessee—a Symposium, 22 Tenn. L. Rev. 776 (1953).

⁵ *Grappone, Inc. v. Harko*, 94 A.2d 372 (N.H. 1953); *Brown v. Thrower*, 256 S.W.2d 962 (Tex. Civ. App. 1953).

⁶ 305 N.Y. 180, 111 N.E.2d 871 (1953).

⁷ *Id.* at 189, 111 N.E.2d at 876.

The result may be justifiable on grounds of implied authority, that Brand could reasonably believe that he was authorized to sell despite the written terms of the bailment agreement. The court, however, seems to base its decision entirely on the appearance of things to the plaintiff, on the representations direct or indirect from Winston to the plaintiff, not from Winston to Brand. The court says in effect that transactions between Winston and Brand, about which the plaintiff knew nothing, created an estoppel from Winston to the plaintiff. Yet from the facts as set out in the opinion it is abundantly clear that everything must have looked to the plaintiff exactly as it would have had there been no display and no past dealings. Consequently, although the court tries hard to preserve the rule that bailment alone does not create power to sell, one can only conclude that bailment to an auctioneer does.

The court noted Section 2-403(2) of the Uniform Commercial Code, which creates a power to sell whenever the possession of goods has been entrusted to a "merchant who deals in goods of that kind." The court remarks that that section "goes far beyond the case under consideration,"⁸ but it is hard to see how.

Cash Sale.—The subject of frequent dispute in the realm of cash sales is, of course, that rule which says that, where payment is by check, title does not pass until the check is honored. The rule is a harsh one when it permits the seller to recover possession from a bona fide purchaser from the original buyer. The rule increases the traps for the unwary purchaser and stands in the way of increasing the negotiability of goods.⁹

Perhaps a desire to reduce the scope of cash sales led the Supreme Judicial Court of Massachusetts, in a recent case, *Hurwitz v. Carpenzano*,¹⁰ to hold a transaction to be a conditional sale and so ineffective because informal.

The basis for the holding was a provision in the agreement to sell an automobile that, "If final payment is made by check title will not pass until check is paid." This is exactly the effect most courts would give, but when the parties set it out expressly, this court held that they had created a conditional sale and the seller's interest was cut off by failure to comply with the formal requirements for such a transaction.¹¹ Using the conditional sale as a judicial device to avoid

⁸ Id. at 189 n.3, 111 N.E.2d at 876 n.3.

⁹ See Note, The "Cash Sales" Presumption in Bad Check Cases: Doctrinal and Policy Anomaly, 62 Yale L.J. 101 (1952).

¹⁰ 329 Mass. 702, 110 N.E.2d 367 (1953), 33 B.U.L. Rev. 417.

¹¹ Cf. *Laughlin Motors v. Universal C.I.T. Credit Corp.*, 173 Kan. 600, 251 P.2d 857 (1952), where a simple cash sale in which the seller transferred possession without getting the cash was held to be a "sale on condition" and not a "conditional sale." This is the normal result, but the distinction remains illusive.

the harsh effects of the cash sale is mentioned and criticized in a note in the *Yale Law Journal*.¹²

Restitution.—The position of a defaulting buyer who has already paid all or part of the price was considered last year in connection with a New York statute entitling him to relief. This year a case in the second circuit, *Amtorg Trading Corp. v. Miehle Printing Press & Mfg. Co.*,¹³ raised the point again and provoked a careful and revealing discussion by Judge Clark.

Amtorg, a New York corporation owned by the Soviet Government, had contracted for printing presses to be delivered in the United States for shipment by Amtorg to the U.S.S.R., and had paid 25 per cent down. Ten presses had been delivered and paid for but twenty were still due when, on March 1, 1948, federal regulation barred further export without a license. When Amtorg was denied a license, it refused tender of the twenty presses. Miehle thereupon sold the presses to the United States Bureau of Printing and Engraving for a price which was \$18,765 more than its contract price to Amtorg. After some earlier inconclusive litigation in the New York courts, Amtorg sued in the federal court seeking the 25 per cent down payment on twenty presses, or \$59,946, plus the \$18,765 additional profit made on resale. The Court of Appeals granted the first and denied the second.

Judge Clark noted the early strict rule of the common law denying relief to one in default, the progress of liberalization from the famous case of *Britton v. Turner*¹⁴ to the rule in Section 357 of the *Restatement of Contracts*, and the recent statutory enactment in New York.¹⁵ All of these, he said, pointed to a modern doctrine permitting recovery by a defaulting plaintiff of anything rendered the innocent defendant in excess of his actual damages. But the plaintiff's recovery here is in fact based upon a federal statute¹⁶ authorizing relief to an American contractor caught by the regulation of March 1, 1948; the federal administrator is directed to provide for the transfer of the commodity involved to a country participating in foreign aid at the same price. Of this Judge Clark says:

We may perhaps assume that the primary object of congressional concern is the American producer. . . . But significantly the Act is not

¹² Note, The "Cash Sales" Presumption in Bad Check Cases: Doctrinal and Policy Anomaly, 6 Yale L.J. 101, 108-09 (1952).

¹³ 206 F.2d 103 (2d Cir. 1953), 67 Harv. L. Rev. 347.

¹⁴ 6 N.H. 481 (1834).

¹⁵ N.Y. Pers. Prop. Law § 145(a), thoroughly explained by the New York Law Revision Commission in two studies and reports. 1942 N.Y. Law Revision Comm'n Rep 185, 187, 1952 N.Y. Law Revision Comm'n Rep., Leg. Doc. (1952) No. 65(C); see 1951 Annual Surv. Am. L. 348, 28 N.Y.U.L. Rev. 376 (1953).

¹⁶ Foreign Aid Appropriations Act of 1949, 62 Stat. 1054, 1059 (1948).

so limited. In terms it is also extended to an "exporter." Surely there will be many cases where a producer sells to an exporter who is amenable to process in this country and who, under the existing law of frustration, is not entitled to repudiate his contract. It seems clear that the benefit of this remedy should be extended also to such an exporter by lowering the technical bars to contract recovery where the producer has already directly availed himself of the congressional relief.¹⁷

Since the case was one of diversity jurisdiction, New York law would ordinarily apply. Judge Clark disposed of this by saying:

Under the precedents it is clear that the Erie-Tompkins principle of respect for state law yields to overriding national policy and law.¹⁸

One must admire the resourcefulness of Judge Clark, or perhaps of counsel for Amtorg, in finding the federal policy theory to deprive Miehle of its windfall. If New York law were applied, as one would have expected, Amtorg could scarcely have succeeded. It is true that the law has been developing in favor of defaulting plaintiffs and that the recent statute indicates a policy of the New York Legislature favoring restitution, but it is equally clear that the policy, or at least the statute expressing the policy, was not intended to apply to contracts made before September 1, 1952. Furthermore the statute seems to have been enacted largely in response to a case denying restitution on facts much harsher than these.¹⁹ The conclusion seems inescapable that in New York restitution is not available except in cases where the 1952 statute applies; yet Judge Clark, in a remarkable paragraph, comes very close to holding that the statute changes the law as to pre-1952 contracts:

Where a changing public policy is so manifest, it would seem that the Court of Appeals of New York might well give some effect to it in cases not as yet regulated by the new statute. It is one of the appreciated defects of the famous Erie-Tompkins doctrine that it suggests a rigidity in the statement of state law by federal judges which is foreign to the habits and customs of their state colleagues, as well as to the development of the law generally. A statement by us of New York law in terms of the old cases might turn out to be more hazardous a course than boldly to try to look into the womb of time, however much that course may be decried.²⁰

¹⁷ 206 F.2d 103, 107 (2d Cir. 1953).

¹⁸ *Id.* at 108.

¹⁹ *Bisner v. Mantell*, 197 Misc. 807, 95 N.Y.S.2d 793 (County Ct. 1950).

²⁰ 206 F.2d 103, 107 (2d Cir. 1953). How does a look into the womb of time make a statute apply to contracts made before the date stipulated in the statute itself? Surely it is arguable that the statute is the best indication of the policy it is meant to express—especially when to apply the policy of the statute to a contract carefully excluded by the terms of the statute would give a greater relief than would the statute itself. N.Y. Pers. Prop. Law § 145(a) would allow the plaintiff to recover only that part of the down payment in excess of 20 per cent of the price, or \$3,753.

Amtorg's claim to the \$18,765 additional profit on resale was denied with virtually no discussion.

In contrast the Court of Appeals of Maryland showed itself less astute in preventing a windfall in the case of *Park Circle Motor Co. v. Willis*,²¹ involving rescission and restitution for breach of warranty of title in the sale of an automobile. Willis, the plaintiff, bought a used car from Park for \$3,195. He drove the car for seven months and 5,000 miles, when it appeared that the car had been stolen, and it was seized by an insurance company as assignee of the true owner. Park then bought the car from the insurance company for \$2,401, and tendered it back to Willis just three days after it had been taken from him. Upon Willis's refusal, Park resold the car for \$2,300. Willis sued for return of \$3,195 plus interest and recovered against Park's claim that the recovery should be limited to \$2,300.

The note in the *University of Pennsylvania Law Review* correctly observes that Willis should not recover the value of the use of the car for seven months and 5,000 miles, but that any decline in the general market during that period should be borne by Park.²² The note then remarks: "The burden of this decline should be on the seller because he is in the better position to bear the risk from sales of stolen property." One wonders by what reasoning this conclusion is reached and why it matters.

Trust Receipts.—The Uniform Trust Receipts Act requires that a statement be filed with the secretary of state to preserve the entruster's security interest. The statement must contain, among other things, "a designation of the entruster and the trustee, and of the chief place of business of each. . . ." In *General Motors Acceptance Corp. v. Haley*²³ the statement was held deficient under this provision because the trustee, E. R. Millen Co., Inc., was designated as "E. R. Millen Company."

Courts are frequently strict on the formal requirements for preserving security interests, but in this case the court justified its strictness as necessary to promote uniformity in the enforcement of a uniform act.

This, we must bear in mind, is a uniform law. No pertinent decision on the present point has come to our attention. But it cannot be doubted that the statute must be construed in a way that will tend to uniform decisions in the several States. Any relaxation in strict interpretation tends, in a given case, to carry in the opposite direction and, for future cases, to open the door wider to still other variations.²⁴

²¹ 92 A.2d 757 (Md. 1952), "clarified" in 94 A.2d 443 (Md. 1953), 101 U. of Pa. L. Rev. 1232.

²² 101 U. of Pa. L. Rev. 1232 (1953).

²³ 329 Mass. 559, 109 N.E.2d 143 (1952).

²⁴ 109 N.E.2d at 146.

The court assumed that a person consulting the index would find the way to the particular statement, but said that was not the test.

Conditional Sales.—The common practice of sellers assigning conditional sales contracts continues to raise interesting cases settling the rights of the buyer and the assignee finance company. These cases also suggest that this is an area of serious misunderstanding and potential unfairness, and all the more so when the seller is dishonest.

In *Thorp Finance Corp. v. LeMire*²⁵ the printed-form conditional sale contract recited that the buyer "acknowledges delivery and acceptance of" the furniture being sold. In fact the furniture had not been delivered and never was. The seller shortly assigned the contract to the plaintiff, and the buyer refused to make payments when it became apparent that the seller was not going to perform. The court decided that the finance company should recover unless the buyer could prove that the assignee had notice of the seller's failure to perform. The recital would ordinarily create an estoppel.

It can hardly be doubted that the finance company, absent special knowledge, reasonably believed that the furniture had been delivered. But it does not seem likely that the buyer knew that in signing the contract he was making representations which would cut off his ordinary defenses as against an assignee. He may very well not have known that the contract would be assigned. Large and well-established retail houses in particular seem to make a special effort to emphasize the buyer's relationship with the house and obscure the fact that very soon the whole deal will be in the hands of a heartless finance company. If this is true, it might well be fairer to base an estoppel on representations in a printed-form conditional sale contract only on a further showing that the particular buyer knew that the contract might be assigned and that the assignee might rely on the statements therein. This would no doubt be hard on finance companies, but the other rule seems even harder on individual buyers.

Warranty.—The law of warranties always produces a large portion of the sales cases. There are obvious reasons why warranty questions tend to go to trial, usually jury trial, and get appealed. It is easy to be misled by the unconscious assumption that those rules which are most litigated are somehow the most important, and thus exaggerate the importance of warranty law. Nevertheless, several cases in this area this year are worthy of mention.

Even under modern code pleading there are at least two occasions when it may be necessary to decide whether an action on an implied warranty of fitness or merchantability is in tort or in contract. One is

²⁵ 246 Wis. 220, 58 N.W.2d 641 (1953).

where the claimant did not purchase directly from the defendant and thus has no privity of contract. The other is where the statute of limitations differentiates on that basis.

In *Blessington v. McCrory Stores, Inc.*²⁶ the New York Court of Appeals held that an action on an implied warranty of fitness was governed by the six-year "contract" period, not by the three-year period governing actions based on negligence, even though there may in fact have been negligence. A law review²⁷ applauded the decision, which overruled two earlier lower court decisions,²⁸ but worried over the fact that the contract theory also supports the requirement of privity.

Two cases involving privity went different ways. In *Worley v. Procter & Gamble Mfg. Co.*²⁹ the plaintiff consumer sued the manufacturer for skin disturbance allegedly caused by a detergent. Although the plaintiff lost for lack of proof, the court made it clear that privity was not required, at least where the article was dangerous if defective and the manufacturer made representations to consumers. After a learned discussion of the problem and the authorities, the court said:

In the case of food products sold in original packages, and other articles dangerous to life, if defective, the manufacturer, who alone is in a position to inspect and control their preparation, should be held as a warrantor, whether he purveys his product by his own hand, or through a network of independent distributing agencies. In either case, the essence of the situation is the same—the placing of goods in the channels of trade, representations directed to the ultimate consumer, and damaging reliance by the latter on those representations. . . . The liability thus imposed springs from representations directed to the ultimate consumer, and not from the breach of any contractual undertaking on the part of the vendor. This is in accord with the original theory of the action.³⁰

The Supreme Court of Ohio held otherwise in *Wood v. General Electric Co.*³¹ There the plaintiff sued for over \$36,000 damages due to a fire allegedly caused by a defective electric blanket manufactured by the defendant. The plaintiff had bought the blanket in the original package from an independent dealer, and the court held: "To support an implied warranty there must be contractual privity between the seller and buyer."³²

²⁶ 305 N.Y. 140, 111 N.E.2d 421 (1953).

²⁷ 28 N.Y.U.L. Rev. 1191 (1953).

²⁸ *Schlick v. New York Dugan Bros.*, 175 Misc. 182, 22 N.Y.S.2d 238 (City Ct. 1940); *Buyers v. Buffalo Paint & Specialties, Inc.*, 199 Misc. 764, 99 N.Y.S.2d 713 (Sup. Ct. 1950).

²⁹ 253 S.W.2d 532 (Mo., St. Louis App. 1952).

³⁰ *Id.* at 537.

³¹ 159 Ohio St. 273, 112 N.E.2d 8 (1953).

³² *Id.* at 278, 112 N.E.2d at 11.

One of the particular bones of contention in the sales article of the Uniform Commercial Code has been Section 2-318, which eliminates the requirement of privity insofar as it extends an implied warranty to

any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods. . . .

This is not, however, a general removal of the requirement of privity. The Code apparently will not change the law governing the relations of manufacturer and consumer.

Remedies.—In *Marko v. Sears, Roebuck & Co.*³³ the plaintiff purchased a rotary-type power lawn mower, which, he was told by defendant's salesman, would stop if it hit a solid object. The catalogue described the mower as having a blade completely shielded. But the first time the plaintiff used the mower, it hit a rock, bounced back, and cut through his foot. While the plaintiff was in the hospital, a friend, at his request, returned the mower and received a refund of the purchase money. Subsequently, the plaintiff brought an action for his personal injuries, the second count of which was for breach of an implied warranty.

Section 69 of the Uniform Sales Act, in force in New Jersey, allows the buyer on breach of warranty to retain the goods and sue for damages, to set up the breach by way of recoupment, or to rescind and recover the purchase price. Thereupon the section states:

When the buyer has claimed and been granted a remedy in any one of these ways, no other remedy can thereafter be granted.

This might seem to stand in the way of recovery, but the plaintiff turned to Section 70 of the Act, which reads:

Nothing in this chapter shall affect the right of the buyer . . . to recover . . . special damages in any case where by law . . . special damages may be recoverable. . . .

It was held that "special damages" in Section 70 includes damages for personal injury resulting from a breach of warranty despite a rescission and refund of the price.

As appears from the opinion, there is little authority on the precise question. The *Virginia Law Review*³⁴ wisely approves of the result on the sensible ground that there is no substantive reason why a buyer who seeks to rescind and recover personal injury damages should get less than one who retains the article and simply sues for damages.

³³ 24 N.J. Super. 295, 94 A.2d 348 (App. Div. 1953).

³⁴ 39 Va. L. Rev. 698 (1953).

Conclusion.—The number of sales cases remains small in relation to the number of transactions which must occur in a year of booming commercial activity. Yet this number is itself large indeed beside the number of cases involving foreign trade, for these cases are virtually nonexistent. It is a curious thing that we can carry on billions of dollars a year worth of foreign trade with scarcely any transactions ending in a United States court in such form as to be digested as containing a "sales" issue. One wonders whether it could be that exporters and importers always come through and never disagree, whether the disputes are all settled by arbitration, or whether the cases lurk in the books under other rubrics. The question is worth investigating.

So far as the cases for the year go, it will have been evident that the most challenging were new investigations into old familiar problems, *viz.*, the *Zendman* and *Amtorg* cases. This is scarcely odd, for both involve points at which the accepted rules put particular strain on our sense of justice. It is doubtful whether legislation could help much in solving the dilemma raised by the innocent bailor and the bona fide purchaser, but New York's attempt at a statutory solution to the other problem, restitution for a defaulting plaintiff who has performed in part, will be watched with interest. In contrast the *Thorp Finance* case raised a more typically "modern" problem, the assignment of a conditional sales contract. This does seem to be an area in need of legislative treatment.

INSURANCE

WILLIAM F. JOHNSON

THE LAW of insurance continues to show its vitality in over 500 reported cases and more than 150 law review articles examined for the purposes of this *Survey*. Most of the cases involved the application of well-established rules to various factual situations. The legislatures were particularly quiet, most of their activity in connection with insurance law being limited to technical and administrative matters pertaining to the various insurance departments and the companies regulated by them. Considerable attention has been given to the subject of compulsory motor vehicle insurance, financial responsibility laws, and unsatisfied claim and judgment funds. Differences of opinion have arisen in this connection among the various insurance commissioners, the insurance companies and motorists, both insured and uninsured.¹ As might be expected, there has been an increase in National Service Life Insurance cases and the Korean conflict has produced a new wave of cases involving military service exceptions and exclusions.

I

MOTOR VEHICLE FINANCIAL RESPONSIBILITY ACTS

The sharp increase of automobile accidents throughout the country, higher jury verdicts in automobile accident cases, the increase in liability insurance rates, and the particularly sharp increase in insurance premiums on policies covering vehicles driven by persons under twenty-five years of age, have all focused a great deal of attention on the question of the uninsured motorist.² So far, the only state which has a compulsory motor vehicle insurance law is Massachusetts,³ which has dealt with this question for over twenty-five years. Most of the present excitement comes about by reason of the action of the New Jersey Legislature in 1952, passing a new Motor Vehicle Security-Responsibility Law⁴ and a companion measure establishing an unsatisfied claim and judgment fund,⁵ as well as the action of the New York State Legislature in failing to pass a program advanced by Governor Dewey and the Superintendent of Insurance, including

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¹ See articles in 25 N.Y. State Bar Bull. 206, 302, 326, 336 (1953).

² See Report, Problems Created By Financially Irresponsible Motorists, Ass'n Bar N.Y.C., Stated Meeting, Dec. 9, 1952.

³ Mass. Gen. Laws c. 26, § 8A; c. 90, §§ 1, 1A, 34A-J; c. 175, § 113A-D (1932).

⁴ N.J. Stat. Ann. tit. 39, c. 6, §§ 23-57 (Supp. 1953).

⁵ N.J. Stat. Ann. tit. 39, c. 6, §§ 61-91 (Supp. 1953).

compulsory automobile insurance, an unsatisfied claim and judgment fund and an assigned case plan.⁶

II

STATE LIFE INSURANCE

Racial Discrimination.—The Supreme Court of Wisconsin held in a case⁷ this year that applications by Negro residents for insurance in the state life fund, which is authorized by statute to be used for life insurance and annuities issued to persons who are within the state or are residents, must be accepted and processed for all persons alike regardless of race or color. Under the Wisconsin state life plan, the Insurance Commissioner has consistently declined to issue insurance in the state life fund to any Negro on the ground that the mortality rate of American Negroes is higher than that of American whites. The court held that a Negro whose application discloses a life expectancy equal to that of white persons is entitled to insurance on exactly the same terms as any other applicant.

III

NATIONAL SERVICE LIFE INSURANCE

Judicial Review.—The United States District Court for the District of New Jersey has held⁸ that the amendment to the National Service Life Insurance Act,⁹ providing that except in the event of appropriate court proceedings, decisions rendered by the administrator, or regulations properly issued, shall be final and conclusive on all questions of law or fact, and that no other official except the judge of a federal court shall have jurisdiction to review such decisions, does not authorize the federal district court to entertain suits for reinstatement of a lapsed policy issued under the Act. The court refused to follow the case of *Unger v. United States*¹⁰ where the court held that it had jurisdiction to entertain a declaratory judgment proceeding, adjudicating that a National Service Life Insurance policy should be issued to the plaintiff in that case. The court in the present case said that "[Section] 808 as amended indicates an extension of procedures available to secure judicial review of the decisions of the administrator on insurance matters and, when construed with the

⁶ See note 1 supra.

⁷ *Lange v. Rancher*, 262 Wis. 625, 56 N.W.2d 542 (1953).

⁸ *Mitchell v. United States*, 111 F. Supp. 104 (D.N.J. 1952).

⁹ 46 Stat. 1016 (1930), 38 U.S.C. § 11(a) (1946), as amended, 61 Stat. 501 (1947), 63 Stat. 880 (1949), 38 U.S.C. § 11 (a) (Supp. 1952); 54 Stat. 1012 (1940), as amended, 60 Stat. 788, 38 U.S.C. § 808 (1946); 54 Stat. 1014 (1940), as amended, 56 Stat. 659 (1942), 60 Stat. 788, 38 U.S.C. § 817 (1946).

¹⁰ 79 F. Supp. 281 (E.D. Ill. 1948).

Administrative Procedure Act, would appear to countenance judicial proceedings against the administrator himself, particularly when insurance matters are involved which are unrelated to the recovery of monetary benefits. But the amendment does not provide the necessary specific consent by the United States to permit suit to be brought against it,¹¹ nor may suit be brought against the Veterans Administration since Congress has not authorized this agency to be sued as such.

Waiver of Premiums.—Section 802(n) of the National Service Life Insurance Act provides that payment of premiums on such insurance may be waived by the Administrator during the continuous total disability of the insured, lasting six or more consecutive months, upon timely application for such waiver being made. The Act provides further that in any case in which the Administrator finds that the insured's failure to make timely application for waiver of premiums "was due to circumstances beyond his control," the Administrator may grant waiver of premiums. Two cases this year involved a determination of what constituted "circumstances beyond his control." In the one case¹² a United States district court held that where government physicians, at the time of the serviceman's discharge, failed to discover that he was then totally disabled by tuberculosis, which led the serviceman not to apply for reinstatement of his policy with waiver of premiums, the situation constituted "circumstances beyond his control." This entitled him to reinstatement of the policy with the premiums waived, even though application therefor was not made until after the expiration of the statutory period for making such application and until after the serviceman had been hospitalized for active tuberculosis. In the other case¹³ a United States court of appeals held that the insured's failure to apply for waiver of premiums because of his ignorance of the fact that he had a totally disabling incurable disease, contracted during military service, until a diagnosis thereof was actually made by physicians while he was on his deathbed, was not unexcused as a matter of law. Ignorance of the existence or seriousness of an injury or disease may constitute such a circumstance in a proper case, if the ignorance is in fact beyond control. Both courts, in these cases, indicated the necessity that there actually be total disability as well as circumstances beyond the control of the insured in order to warrant reinstatement under the provision of the Act.

In another case,¹⁴ however, it was held that this section applies

¹¹ Mitchell v. United States, 111 F. Supp. 104, 107 (D.N.J. 1952).

¹² Myers v. United States, 112 F. Supp. 809 (E.D. Mo. 1953).

¹³ Landsman v. United States, 205 F.2d 18 (D.C. Cir. 1953).

¹⁴ Fox v. United States, 201 F.2d 883 (5th Cir. 1953). This suit was brought by the wife of the deceased serviceman and her second husband for the purpose of waiving the premiums and having the policy reinstated.

only to the usual policy kept in force under premium-paying conditions and has no application to gratuitous insurance which does not require the payment of premiums. The court held that where the serviceman, who was a prisoner of the Japanese until September 12, 1945, failed to file by September 30, 1945, a claim for continuance of insurance and waiver of premiums on grounds of disability, the policy ceased and terminated as of the latter date. A vigorous dissenting opinion by Circuit Judge Rives in this latter case takes issue with the majority view that the soldier, within eighteen days after he was liberated from the Japanese prison and before he could be evacuated to a hospital in the United States, must have become acquainted with all of his legal rights, including the changes enacted by Congress while he was in prison, and must have forwarded an application in writing for the continuance of his insurance to which admittedly he would have been entitled without further payment of premiums. Judge Rives said that

if the law required such a harsh ruling, there is nothing to be said except to express our regrets. Usually, however, the law is not so unreasonable and I do not think that it is so in this instance when all of the pertinent statutes are read together. . . . I do not think that Congress was faint-hearted in its gratitude toward combat veterans, or that they intended to put veterans with gratuitous insurance in any less advantageous position than veterans who had "sufficient time to apply for such insurance prior to engaging in combat."¹⁵

Estate of Beneficiary.—In two companion cases¹⁶ the United States Supreme Court, Mr. Justice Frankfurter and Mr. Justice Jackson dissenting from the particular holding, held that the estate of a beneficiary of National Service Life Insurance is not entitled to the proceeds matured but unpaid at the death of the beneficiary. In both of these cases the persons who were ultimately determined to be entitled to take as beneficiaries died during a course of litigation determining their right. The Court construed the effect of the provisions of Section 602(i) of the Act which provides in part that, "The right of any beneficiary to payment of any installments shall be conditioned upon his or her being alive to receive such payments. No person shall have a vested right to any installment or installments of any such insurance," and Section 602(j) providing that "no installments of such insurance shall be paid to the heirs or legal representatives as such of the insured or any beneficiary, and in the event that no person . . . survives to receive the insurance or any part thereof, no payment of the unpaid installments shall be made." In both cases the

¹⁵ *Id.* at 885-86.

¹⁶ *United States v. Henning*, 344 U.S. 66 (1952); *Baumet v. United States*, 344 U.S. 82 (1952).

district court had awarded the proceeds to the personal representatives of the deceased beneficiaries who had been determined as proper parties to take the proceeds of the policies. The Supreme Court, Mr. Justice Clark writing the opinions, reversed, holding that the restrictive language of the statute above quoted applied to matured proceeds as well as other payments. "We conclude that in this crisis legislation Congress, fully aware of the sometimes inevitable delays in payment, preferred the occasionally harsh result to a course of action which would permit funds intended for living members of the narrow statutory class of permissible takers to seep down to an enlarged class of sub-beneficiaries created not by the Act itself but by intended beneficiaries' testamentary plans."¹⁷ The dissenting opinion, with which this reviewer respectfully concurs, would allow the estate of a beneficiary to recover payments that fall due while the beneficiary is allowed to receive them. A beneficiary may be put to the trouble and expense of litigating a claim to establish his right and die in the course of the delays attendant upon such an attempt. It appears that Congress could not have intended a beneficiary to die without any hope of recovering, at least for his estate, the proceeds which were rightfully his.

IV

INSURER'S NONCONTRACTUAL LIABILITY

Timely Notice of Rejection.—The Supreme Court of Oklahoma, in a case¹⁸ decided late last year, held that it was the duty of an insurance company upon receipt by its local agent of an application for hail insurance, and the receipt and acceptance of a note executed by the applicant for the premium, within a reasonable time thereafter either to write and deliver the policy applied for or to reject the application and notify the applicant accordingly. In this case the application provided that the company would issue the policy or reject the application within 240 hours after the signing of the application by the proposed insured and the agent of the company. The application also provided that if any crop described therein was hailed upon during the twenty-four-hour period after signing, the crop should become uninsurable. The court, having found that the latter had not occurred under the facts, rejected the insurer's contention that this absolved it from any duty to reject the application. No excuse having been offered for such failure, the court held that the insurer's failure to give timely notice of its rejection of the application constituted negligence. Accordingly, a judgment of the lower court for damages was affirmed.

¹⁷ United States v. Henning, 344 U.S. 66, 75-76 (1952).

¹⁸ Security Nat. Fire Ins. Co. v. Wegner, 207 Okla. 536, 251 P.2d 795 (1952).

Bad Faith in Refusing to Settle.—A hospital was insured under a public liability policy in the face amount of \$50,000 to indemnify the insured against negligence or malpractice claims or judgments. A patient was seriously injured in the absence of a nurse by being permitted to fall from a bed while under the influence of a drug which had been administered in the course of treatment. This drug had the effect of making the patient very restless, requiring her to remain under constant supervision. As a result of the fall and the injuries received, the patient underwent two major brain operations. As a result of the injuries she was rendered totally and permanently blind. The insurer was promptly notified and investigated the case.

Suit was instituted against the hospital and the attending physician, seeking to recover the amount of \$125,000 as damages. The attorney for the plaintiff in the negligence action offered to settle the case for \$50,000, provided that such settlement was made within a reasonable time and before it was necessary to go to the trouble and expense of preparing the case for trial. The insurance company's attorneys ignored the offer in settlement although the hospital made direct representations to the insurance company stating that liability was clear, that the only question to be determined was the amount of damages and making a demand upon the insurer to accept the proposed compromise settlement. This was also ignored by the insurance company. Sometime later the company's attorneys indicated that it was their position that the hospital should not be concerned about any judgment in excess of the amount of insurance since, under a series of court decisions, liability on charitable organizations existed only as to "free" property or insurance available to pay the judgment. The insurance company's attorneys also indicated that they would settle only if the insurer for the physician, the codefendant, would contribute to the settlement. The latter took the position that there was no liability on the part of their insured and all the facts of the case were clear in sustaining this position. Shortly before the case was called for trial the insurance company's attorney advised the attorney for the plaintiff that if he would make an offer of settlement in the amount of \$45,000 it would be accepted. This the attorney refused to do. At the conclusion of plaintiff's case counsel for the defendant physician moved for a directed verdict in favor of their defendant and the motion was granted. A recess was asked and the company's attorney again asked the attorney for the plaintiff to make an offer of settlement somewhere between \$25,000 and \$50,000 and he would see if settlement could be made. This again was refused. During this recess the company's attorney, however, called the supervisor of claims at the home office and was authorized to pay the policy

limit of \$50,000 when the opportunity presented itself. After the case went to the jury he again asked plaintiff's attorney to make an offer between \$25,000 and \$50,000, which, when it was refused, he finally raised to \$50,000. This, too, was refused, but the attorney for the plaintiff, then being satisfied with his position with the jury, stated that he would accept an offer of \$75,000 for recommendation to his client. At this point the insurance company's attorney asked the defendant hospital to contribute to such a settlement, which they refused to do. Judgments were returned against the hospital in the sum of \$100,000, which was later reduced to \$75,000. The court held¹⁹ that the record established that the defendant insurer had been guilty of bad faith in refusing to settle and was consequently liable for the full amount of the judgment against the hospital.

V

CHANGE OF BENEFICIARY

By Guardian of Incompetent Insured.—An Ohio court declared in a case²⁰ last year that a guardian of an incompetent is not, by virtue of that appointment, authorized to exercise the right of the incompetent to change the beneficiary provisions of a policy in which the incompetent is the insured and where the right to change the beneficiary has been reserved. In this particular case the insured-incompetent had agreed upon a plan with the insurance company for the payment of the proceeds in the event of his death. Here the policy provided for installment payments to the life beneficiary for the period of her lifetime. It appeared that it would be necessary for the beneficiary to advance premiums from her own funds in order to keep the policies alive, and this she was reluctant to do in view of the fact that she would not receive the proceeds in a lump sum but would be limited to installments. The court held that a beneficiary of an insurance policy has no vested right in such policy until the death of the insured, where the insured has the right to change beneficiaries without notice. And in making any premium payments the beneficiary would be a volunteer.

VI

ESTOPPEL

In a split decision the Supreme Court of Wisconsin upheld²¹ the rule that an insurer will not be permitted to avoid a policy by taking advantage of misstatement, misrepresentation, or concealment of fact

¹⁹ *Vanderbilt University v. Hartford Accident & Indemnity Co.*, 109 F. Supp. 565 (M.D. Tenn. 1952).

²⁰ *Zuber v. Zuber*, 93 Ohio App. 195, 112 N.E.2d 688 (1952).

²¹ *Emmco Ins. Co. v. Palatine Ins. Co.*, 263 Wis. 558, 58 N.W.2d 525 (1953).

material to the risk, due to mistake, fraud, negligence or other fault of its agent and not to fraud or bad faith of the insured. This is the rule even though the insurer would not have issued a policy had truthful statements been made in any case where the agent makes or fills in the application without the authority of the insured, with information obtained from a source other than the insured or without questioning the insured. In this particular case insured requested the agent to "transfer" a fire policy from one automobile to another. The earlier automobile had not been encumbered whereas the new car was subject to a conditional sale contract. The agent did not inquire of the insured concerning any encumbrance and filled in the application with the word "None" where the question was asked as to encumbrances. The majority of the court held that principles of equity and fair dealing required that the company not be permitted to take advantage of the wrongful act of its own agent by showing that the fact as to encumbrances was other than as written into the policy by the agent. The dissenting justices based their opinion upon the theory that if the circumstances of ownership were not the same in the new car as in the old, so as to affect the coverage, the insured alone knew it and it was his responsibility to inform the agent. "Without such information neither the agent nor the principal can be charged with the knowledge or with acting recklessly without knowledge in obeying [the insured's] instructions."²² It would seem that the rule upheld by the majority is much the better one in the light of general practice in the writing of insurance policies of this type. The insurance companies themselves, through their agents, have developed a system of extreme informality in the method by which insureds apply for coverage. Oral application, frequently by telephone, with no questions asked, is the most frequent means employed in this type of business. To hold the insured responsible for underwriting refinements would seem to place too great a burden on a public which has been trained to the idea that the insurer or its agents will ask whatever it wants to know.

VII

RESCISSION

By Insured for Fraud of Agent.—The overly enthusiastic representations of a soliciting agent as to the merits of a policy have been held²³ to be ground for rescission and return of the first premium paid by the insured even where insured has subsequently received for the policy which did not contain the benefits represented by the agent. In

²² 58 N.W.2d 525, 535 (1953).

²³ *Stegman v. Professional & Business Men's Life Ins. Co.*, 173 Kan. 744, 252 P.2d 1074 (1953).

this case the insurer's soliciting agent had made certain representations to the insured to the effect that he would receive 10 per cent interest on all money he paid in after the payment of the third annual premium. The agent also made certain other representations, all of which induced the insured to apply for the policy and pay the first annual premium. Upon delivery of the policy the agent again assured the policyholder that these features, previously described, were contained in the policy and as a result of this further assurance the policyholder receipted for the policy itself. The misrepresentations were not discovered by the policyholder until about twenty-five days after delivery of the policy, at which time his attorney returned the policy to the company with a demand for return of the premium. The court held that the evidence was sufficient to take to the jury the question whether the plaintiff was induced to apply and give a receipt for the policy by the defendant's soliciting agent's fraudulent misrepresentations. The jury having found that he was, the judgment of the lower court for rescission and return of premium was affirmed.

VIII

EXCEPTIONS

Is Korean Action a "War"?—Last year's *Survey* article²⁴ reported on two cases²⁵ in the superior court of Pennsylvania which answered this question in the negative. Both of these cases involved death resulting from what has been called "the police action in Korea." The Supreme Court of Pennsylvania during the past year affirmed the superior court in both cases.²⁶ The decisions have received a great deal of attention in law reviews,²⁷ all discussing at length the technical and legal meaning of the word "war" in the sense of a lawfully declared war and the common meaning as an armed conflict. Directly opposed to the opinion of the Pennsylvania court in the *Harding* and *Beley* cases are two cases decided this year, one by the superior court of New Jersey²⁸ and the other by the United States District Court for the Southern District of California.²⁹ In both of these cases it was held

²⁴ 1952 Annual Surv. Am. L. 486, 28 N.Y.U.L. Rev. 549 (1953).

²⁵ *Harding v. Pennsylvania Mut. Life Ins. Co.*, 171 Pa. Super. 236, 90 A.2d 589 (1952); *Beley v. Pennsylvania Mut. Life Ins. Co.*, 171 Pa. Super. 253, 90 A.2d 597 (1952).

²⁶ *Harding v. Pennsylvania Mut. Life Ins. Co.*, 373 Pa. 270, 95 A.2d 221, cert. denied, 346 U.S. 212 (1953); *Beley v. Pennsylvania Mut. Life Ins. Co.*, 373 Pa. 231, 95 A.2d 202, cert. denied, 346 U.S. 220 (1953).

²⁷ *Decisions*, 28 N.Y.U.L. Rev. 899 (1953); 3 Cath. U.L. Rev. 60 (1953); 57 Dick. L. Rev. 172 (1953); 21 Geo. Wash. L. Rev. 657 (1953); 26 So. Calif. L. Rev. 328 (1953); 5 S.C.L.Q. 287 (1952); 55 W. Va. L. Rev. 149 (1953).

²⁸ *Stanbery v. Aetna Life Ins. Co.*, 26 N.J. Super. 498, 98 A.2d 134 (Law Div. 1953).

²⁹ *Weissman v. Metropolitan Life Ins. Co.*, 112 F. Supp. 420 (S.D. Cal. 1953).

that the Korean conflict is a war within the meaning of that term as used in an insurance policy to exempt the double indemnity provisions if death occurred while the insured was in the military, naval or air-forces of any country at war. The California court, referring to the *Prize* cases,⁸⁰ said that the Korean fighting was on such a scale that it was not necessary to baptize it formally as a war. The court also took note of the action of Congress in appropriating money to carry on the fighting and the furnishing of "arms, munitions, ships and troops," thus sanctioning the fighting "in the same manner as if there had been a formal declaration of war."

This question appears to be far from resolved and the reader is referred to a discussion of the World War II cases in previous *Survey* articles.⁸¹

Aeronautic Flight.—Many variously expressed exceptions have appeared in double indemnity policies written in this country with the rise and development of aviation.⁸² There is a long line of cases involving the question of whether or not an "aeronautic flight," appearing in the language of the exceptions, means something more than merely flying in an airplane as a passenger. Perhaps the best-known case on the subject, involving the death of a famous columnist, is that of *Clapper v. Aetna Life Insurance Company*.⁸³ In this case the court gives controlling force to the adjective "aeronautic," pointing out that *Webster's New International Dictionary* defines the word "aeronautics" as "the science that treats of the operation of aircraft" and the word "aeronautic" as "pertaining to aeronautics or aeronauts." Then the court holds that since the flight, to be within the policy exceptions, must be one pertaining to the science of operating aircraft, a mere passenger is not included within the exception. The Supreme Court of Texas⁸⁴ flatly rejected the *Clapper* reasoning but followed that appearing in a New Jersey case⁸⁵ and a Florida case.⁸⁶ The latter case held that a "passenger in an aeroplane flying in the air, whether he takes part in the operation of the aeroplane or not, is 'participating in aeronautics' within the intent and meaning of the provision specifically excepting such a risk from the indemnity contract contained in the policy."⁸⁷ In the instant case, the court says that it would be difficult indeed to imagine why the insurer would exempt himself from the

⁸⁰ The *Amy Warwick*, 2 Black 635 (U.S. 1862).

⁸¹ 1947 Annual Surv. Am. L. 792; 1948 Annual Surv. Am. L. 633; 1949 Annual Surv. Am. L. 692.

⁸² See 1950 Annual Surv. Am. L. 551.

⁸³ 157 F.2d 76 (D.C. Cir. 1946).

⁸⁴ *Aetna Life Ins. Co. v. Reed*, 251 S.W.2d 150 (Tex. 1952).

⁸⁵ *Bew v. Travelers Ins. Co.*, 95 N.J.L. 533, 112 Atl. 859 (1921).

⁸⁶ *Travelers Ins. Co. v. Peake*, 82 Fla. 128, 89 So. 418 (1921).

⁸⁷ *Id.*, at 130, 89 So. at 418-19.

hazard of death of the operator of a flying plane and at the same time accept that hazard as to a passenger when the danger to both is necessarily the same. Any attempt to reconcile the decisions in cases of this sort would be impossible. It is perhaps sufficient to note that the question is by no means settled.

IX

CONSTRUCTION OF PARTICULAR POLICY PROVISIONS

Is Arbitration a Suit?—Last year's *Survey* article³⁸ commented on a case under a contractor's protective liability policy obliging insurer to defend any suit against the insured, stating that the term "suit" was held to be broad enough to include "arbitration" so as to obligate the insurer to pay the judgment resulting therefrom. On appeal, this judgment was affirmed as modified.³⁹ The modification, however, is sufficient to negate the conclusion of the *Survey* article insofar as the judgment is modified by (a) adding to subdivision two of the second decretal paragraph the word "not" between the word "is" and the word "required," and (b) by adding to subdivision three of the second decretal paragraph the word "not" between the word "is" and the word "obligated." Accordingly, the present writer is pleased to modify the report in last year's article by adding the word "not" between the word "held" and the word "to." In other words, a "suit" does not include "arbitration."

Total Disability.—A case,⁴⁰ interesting on the facts, held that the evidence presented a question for the jury as to whether plaintiff had been continuously confined within the house as required by a disability policy, although the evidence showed that insured had frequently left the house to visit the doctor, to go fishing, to attend church, and to go automobile riding as well as for other purposes. The case pretty well confirmed the trend of liberal interpretation of "house confinement" clauses. So much confusion has arisen in connection with interpretation of such clauses that one court was even led to giving an instruction which defined "confining illness within doors" as "illness, the direct result of which was to render plaintiff unable to do all of the substantial and material acts necessary to the prosecution of his business or occupation in a customary and usual manner." The court was, of course, reversed⁴¹ in a clear-cut statement that to apply the defini-

³⁸ 1952 Annual Surv. Am. L. 488, 28 N.Y.U.L. Rev. 551 (1953).

³⁹ *Madawick Contracting Co. v. Travelers Ins. Co.*, 281 App. Div. 754, 118 N.Y.S.2d 115 (2d Dep't 1953).

⁴⁰ *Franklin Life Ins. Co. v. Bassett*, 64 So.2d 613 (Ala. App. 1953).

⁴¹ *Rice v. American Protective Health & Accident Co.*, 157 Neb. 256, 59 N.W.2d 378 (1953).

tion of total disability under an accidental injury policy to "confining illness" was error and prejudicial.

Accidental Means: Sunstroke.—In a case⁴³ arising under a life and accident policy insuring against bodily injuries sustained through accidental means, the Supreme Court of Ohio distinguished three previous Ohio cases where sunstroke was the accidental means by which death occurred. The court made this distinction in a four-to-three decision on the facts of each of the previous cases, holding that in the present case it could not be said that the sunstroke was the result of voluntary exposure but rather that its occurrence was not the usual happening under such circumstances in the common experience of men and thus that death was caused by accidental means. Distinguishing the earlier cases, the court pointed out that in one⁴³ the insured died from a heart attack following a voluntary cold bath where the water was no colder than he wanted it to be; in another⁴⁴ death resulted from amebic dysentery contracted from drinking water, in which recovery was denied because dysentery was a disease and not an injury; and in the third⁴⁵ that the insured died as a result of a rupture caused by administering to himself an enema in the intended manner by voluntarily connecting the rubber tube to a faucet in the bathtub. The court here, following what it held to be the apparently better-reasoned authority, stated that the sunstroke, if suffered unexpectedly, is within an accident policy insuring against bodily injuries sustained through accidental means.

Accidental Means: Sneezing.—It was held this past year⁴⁶ that an insured, who died as a result of a brain hemorrhage, occurring when he sneezed violently after sniffing into his nose accumulated whiskers which he was endeavoring to blow out of an electric razor, met death by accidental means. Although acknowledging the fact that the insured's arterial walls were weak and thin, the court relied on the general proposition that the causes referred to in the policy are the proximate or direct and not the remote causes. This does not mean, however,

that the cause or condition which is nearest in time or space to the result is necessarily to be deemed the proximate cause. It means that the law will not go farther back in the line of causation than to find the active, efficient, procuring cause, of which the event under considera-

⁴³ Hammer v. Mutual Benefit Health & Accident Ass'n, 158 Ohio St. 394, 109 N.E.2d 149 (1952).

⁴⁴ New Amsterdam Casualty Co. v. Johnson, 91 Ohio St. 155, 110 N.E. 475 (1914).

⁴⁵ Burns v. Employers' Liability Assur. Corp., 134 Ohio St. 222, 16 N.E.2d 316 (1938).

⁴⁶ Mitchell v. New York Life Ins. Co., 136 Ohio St. 551, 27 N.E.2d 243 (1940).

⁴⁶ Hughes v. Provident Mut. Life Ins. Co., 258 S.W.2d 290 (Mo., Kansas City App. 1953).

tion is a natural and probable consequence, in view of the existing circumstances and conditions. The law does not consider the cause or causes beyond seeking the efficient predominant cause, which, following it no farther than those consequences that might have been anticipated as not unlikely to result from it, has produced the effect. An injury which might naturally produce death in a person of a certain temperament or state of health is the cause of his death if he dies by reason of it, even if he would not have died if his temperament or previous health had been different.⁴⁷

Loading and Unloading.—Two cases involving factual extension of the meaning of "loading and unloading" in an automobile liability policy issued to cover the use of trucks were decided this year. The Court of Appeals of New York held⁴⁸ that where a liability policy insuring delivery vehicles provided that the term "insured" included any person using the automobile with permission of the named insured, and that the "use" of the automobile for such purpose included the "loading and unloading thereof," an employee of delivery-service customer, engaged in counting and checking clothes at the curb for inventory purposes while two fellow employees rolled out garments on movable racks to be placed in the vehicle, who bumped into a pedestrian causing her to fall and sustain serious injuries, was an "insured" entitled to policy protection. According to the court the use of the automobile for such purposes included the loading and unloading thereof, embracing not only the immediate transfer of the goods to or from the vehicle but also the complete operation of transporting the goods between the vehicle and the place from or to which they were being delivered.

The Supreme Court of Wisconsin held⁴⁹ that liability for injury sustained by a pedestrian, when he fell through the opening in a sidewalk which insured's truck driver had left unattended, was within coverage of a policy insuring against liability for injury arising out of the ownership, maintenance or use of trucks, including loading and unloading thereof. In this case the brewing company's driver got off the truck, walked to the sidewalk and opened the trapdoor preparatory to putting the kegs of beer from the truck through the trapdoor into the basement. The truck was double parked on the street and as the driver returned to the truck he was asked to move it so that a car which was parked between the truck and the curb could get out. While the truck driver was doing this a third party fell into the trapdoor

⁴⁷ Id. at 294.

⁴⁸ *Wagman v. American Fidelity & Casualty Co.*, 304 N.Y. 490, 109 N.E.2d 592 (1952).

⁴⁹ *Hardware Mut. Casualty Co. v. St. Paul Mercury Indemnity Co.*, 264 Wis. 230, 58 N.W.2d 646 (1953).

opening. The claim was paid by the automobile liability carrier, which in turn brought the present suit against an employer's liability carrier. The court held that the automobile liability carrier was solely liable under its policy for an accident arising under these facts.

Pickup Truck.—In a holding⁵⁰ contra to a Tennessee case⁵¹ reported in the 1951 *Survey* article,⁵² the Springfield court of appeals of Missouri held that a pickup truck was not within the clause authorizing benefits for accidental death "while riding as a passenger or a driver in a private pleasure-type" automobile. It may be concluded, as the court did here, that a pickup truck is neither a pleasure-type vehicle nor, except in certain circumstances, can it be classified as a passenger car. However, as referred to in the previous article, the use to which such vehicles are put by so many people might result in sufficient ambiguity to require a holding for the insured. Nevertheless the earlier case said it did and this one that it did not.

Collision.—In a recent case the right front tire of an automobile struck a rock, causing the rock to strike the under side of the automobile. The motorist continued to drive on for about one-and-a-half miles until he noticed that his oil pressure had dropped; he stopped the car and found that the rock had made a hole in the oil can, which necessitated replacement of the drain plug and repair of the oil can. It was held⁵³ that such damage was the result of a "collision" within the meaning of the policy insuring against damage caused by "collision" of an automobile with another object. One might wonder whether, had he continued to operate the vehicle to a point where a loss of oil resulted in burning out bearings and other mechanical damage, the result would have been the same. From the opinion in this case and an analysis of the extent of such a "collision," it would appear that this result would logically follow.

⁵⁰ *La Fon v. Continental Casualty Co.*, 259 S.W.2d 425 (Mo., Springfield App. 1953).

⁵¹ *Aetna Life Ins. Co. v. Bidwell*, 192 Tenn. 627, 241 S.W.2d 595 (1951).

⁵² 1951 Annual Surv. Am. L. 572.

⁵³ *Calvert Fire Ins. Co. v. Koenig*, 259 S.W.2d 574 (Tex. Civ. App. 1953).

TRANSPORTATION LAW

ARNOLD W. KNAUTH

THE MOST interesting aspects of carrier law in 1953 seem to concern pipeline carriers and air carriers. The highways, streets, and rails, the elevators and moving stairways may be left for another year. Ocean shipping is, as usual, separately dealt with under the rubric Admiralty and Shipping.¹

I

PIPELINE CARRIERS

Modern legal interest in pipelines is due to the natural gas industry. The ancient aqueduct was a simple public utility, and at most caused political-economic disputes such as the diversion of Colorado River water to California, the division of the Delaware River flow between Pennsylvania, New Jersey and New York, and the handling of the St. Lawrence flow as between the Dominion of Canada and the United States, and the Province of Ontario and the State of New York.

Trouble began with oil wells. Hundreds of men had flowing or pumping wells; one man in the field had a pipeline to a local or extrastate refinery. The pipe owner offered to pipe away everybody's oil on condition that the oil was sold to him at the pipeflange. He had a monopoly position; the producers had few or no alternative methods of getting their oil out of the field and to a market. The market was a refinery where the oil could be split up into numerous products, liquid, gaseous and solid, and find its way into general channels of trade. Alternatively, the pipeline terminus was at the water's edge, where tank vessels could take the crude oil away. This situation was covered by the extension of the Interstate Commerce Act to common-carrier pipelines in 1906, and its interpretation in *The Pipe Line Cases* in 1914.² That holding was later summarized by Mr. Justice Reed as deciding that all buyers of oil to carry the oil are common carriers "because the act's evident purpose was to bring within its scope all pipelines that would carry all oil offered 'if only the offerers would sell' at the carrier's price."³ The 1906 Act specifically excluded water, natural gas and artificial gas.

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¹ See p. 506 *infra*.

² 234 U.S. 548 (1914).

³ *Champlin Refining Co. v. United States*, 329 U.S. 29, 37 (1946) (dissenting opinion).

There later came the realization of the immense value of natural gas, with great technical efforts to store what had previously been allowed to dissipate. One method was to reduce the temperature until the gas liquefied; this process was involved in the great Cleveland explosion.⁴ Another was to find deep subterranean caves and domes for storage as gas. Success in storage enabled the industry to equate the annual flow, affected by seasons and temperatures, with the human demand, affected by winter weather and varying industrial activity. The gas-producing states—most notably Oklahoma—sought to regulate the output to prevent waste. The gas-consuming states sought to regulate the distribution. The federal interest in interstate commerce, in natural resources and in taxes crossed that of the states, and in 1938 the Federal Natural Gas Act set up a broad line of separation.⁵ Under this Act the producing state handled the local gathering in the gas fields while the consuming state could regulate local distribution to consumers. The Federal Government controlled the interstate commerce aspect through the Federal Power Commission. For fifteen years the Federal Power Commission and the various state public utilities commissions have been whittling at those lines, sometimes aided and sometimes opposed by segments of the industry. The courts have labored over each whittling argument, with frequent displays of deep-seated differences of opinion; arguments of profound importance are still awaiting resolution.

We may start with the *Hope* case⁶ which decided that the interstate commerce power authorizes the Federal Government and its Power Commission to regulate rates, rate-bases and practices of the interstate pipeline in gathering the gas in the local fields of West Virginia. The Governor of that state argued in person before the Supreme Court against the ousting of his state from the regulation of local gas-gathering, an activity from which the state derived important revenues; the Court negated his argument without difficulty. Thus the federal power entered the gas-gathering fields.

In 1946, the first *Champlin* case,⁷ by the narrow margin of five to four, interpreted the 1938 Act to authorize the Federal Power Commission to require full economic information and reports from Champlin, a refinery in Oklahoma which pumped only its own refinery products through its own pipeline to its own tanks in Kansas, Nebraska and Iowa, where local sales were made. Declaring that

⁴ See 1948 Annual Surv. Am. L. 599.

⁵ 52 Stat. 821 (1938), 15 U.S.C. § 717 (1946).

⁶ *FPC v. Hope Natural Gas*, 320 U.S. 591 (1944), discussed in 1949 Annual Surv. Am. L. 353, 361.

⁷ *Champlin Refining Co. v. United States*, 329 U.S. 29 (1946). See 1946 Annual Surv. Am. L. 474.

Champlin was a common carrier within the meaning of the Act—although not offering to carry other people's products either for hire or at all—the majority reasoned that the statute would be meaningless if it merely required what the case law already had laid down. This was modified, but not wholly abandoned, in *Champlin II*⁸ in 1951, where the Court said that although Champlin was *not* a common carrier under Section 6 of the Interstate Commerce Act—it did not render a public service—it must make full reports under Section 20 in order to assist the Commission with economic data useful in regulating others who are common carriers. The Court hinted that “should a future change in circumstances make full-scale regulation appropriate,”⁹ the data now required would be useful.

The push-and-pull between small gatherers of gas in the fields, seeking a high price, and the small consumers in the distant cities, seeking a low cost, together with the apparent lack of co-operation between the producing states and the consuming states, has induced the Federal Commission and the federal courts to explore the extent of federal power to intervene and regulate in some over-all manner. This is reflected in the following cases. *Interstate Natural Gas Co. v. FPC*¹⁰ declared that the FPC had power to order a rate reduction for local sales of natural gas in the field to a company which combined the output of several wells for interstate pumping. Later the Court, with three concurring opinions and a three-justice dissent, met the question who should get the impounded rate money after the litigation ended with a decision in favor of the lower rate; this favored the ultimate consumer, but without a clear formula.¹¹ In the *Panhandle* case¹² the state court vacated a state regulatory order for filing of tariffs, leaving the situation without local regulation. In affirming, the Supreme Court said that the 1938 Natural Gas Act only reached such local distribution situations as a state could not reach. The case also opened the problem of an interstate pipeline making direct sales to large industrial users, without an intermediate local distributor, either at high (interstate long-distance) pressure, or at an intermediate pressure. The Court said that such sales, although interstate commerce, are left by the 1938 Act to state regulation. *Republic Natural Gas Co. v. Oklahoma*¹³ concerned a private pumper of its own natural

⁸ United States v. Champlin Refining Co., 341 U.S. 290 (1951).

⁹ Id. at 296.

¹⁰ 331 U.S. 682 (1947), discussed in 1947 Annual Surv. Am. L. 97, 435.

¹¹ FPC v. Interstate Natural Gas Co., 336 U.S. 577 (1949), 1949 Annual Surv. Am. L. 354.

¹² Panhandle Eastern Pipe Line Co. v. Public Service Comm'n, 332 U.S. 507 (1947), affirming 224 Ind. 662, 71 N.E.2d 117 (1947).

¹³ 334 U.S. 62 (1948).

gas from Oklahoma to Kansas. Oklahoma ordered it to connect its pipeline with another producer and take the gas of both rateably. The Court, in a five-to-four division, said that this was not a "final" state court decision, and therefore refused to take the appeal. The dissenters wanted to go into the merits at once, and did so a year later,¹⁴ upholding the state order.

*Memphis Natural Gas Co. v. Stone*¹⁵ involved a franchise tax by Mississippi on the capital invested in a pipeline crossing that state from a Louisiana gas field to the city of Memphis, Tennessee; 135 miles of pipe and two compressor stations were in the taxing state, and the Court, with four dissenters, held the tax good.

FPC v. Panhandle Eastern Pipe Line Co.,¹⁶ a five-to-three decision, split the Court on the question whether the Federal Commission can prohibit and regulate pipelines in their trading of gas reserves. Panhandle had sold 12 per cent of its gas reserves, despite a disapproving FPC order. The decision was that the Natural Gas Act, in allowing the states to regulate the "production or gathering" of natural gas, left the transfer of gas leases to state control, thus excluding the federal power.

*FPC v. East Ohio Gas Co.*¹⁷ produced a very serious debate. East Ohio was a wholly intrastate distributor and seller of natural gas; it sold directly to consumers and was fully subject to Ohio state regulation. Yet the majority held it subject to federal regulation under the 1938 Act, reasoning that the continuous flow of gas from other states to and through the company's high-pressure lines constituted interstate transportation. Thus, all intrastate high-pressure pipelines are subject to federal control. The legal officers of many states appeared and argued against this view, reflecting a profound interest in the result.

*Panhandle v. Michigan Public Service Commission*¹⁸ concerned an effort by an interstate natural gas pipeline to make direct sales to large industrial consumers in the Detroit area without intervention of the local distributor. The Supreme Court upheld the state court's holding that Panhandle could not sell directly without a certificate of convenience and necessity from the state officers, for although the proposed sales were clearly interstate, they were "essentially local" and subject to state regulation. This phrase has been used in other

¹⁴ *Cities Service Gas Co. v. Peerless Oil & Gas Co.*, 340 U.S. 179 (1950).

¹⁵ 335 U.S. 80 (1948). See 1948 Annual Surv. Am. L. 90, 325.

¹⁶ 337 U.S. 498 (1949).

¹⁷ 338 U.S. 464 (1950). See 1950 Annual Surv. Am. L. 58, 96.

¹⁸ 341 U.S. 329 (1951), affirming 328 Mich. 650, 44 N.W.2d 324 (1950), discussed in 1951 Annual Surv. Am. L. 117, 542.

connections, e.g., to allow state compensation acts to care for workmen injured on the water front in the federal admiralty jurisdiction.

The Oklahoma statute of 1941, setting up a unitized management of common sources of oil and gas supply in that state, came before the Court in 1952, the year after the act was repealed. However, the Court was informed that the point was not moot, and considered the challenge to the statute's constitutionality under Article I, Section 10, and the Fourteenth Amendment of the Constitution. It decided that there was no federal question and thus that the 1941 statute had been valid.¹⁹

Pending as this is written is *Phillips Petroleum v. Wisconsin*, a case which will clarify, if not overthrow, the *Interstate Natural Gas* decision²⁰ of 1947. Phillips Petroleum Company has a very large reserve of stored gas, and consumers in Wisconsin and Michigan are seeking federal control of its price. The Federal Power Commission had decided that it has no authority to regulate prices in the gathering and storage field, but the Court of Appeals for the District of Columbia took the opposite view.²¹ The Supreme Court initially denied certiorari²² but on reconsideration granted it²³ in response to applications from many organizations and states (in which the Department of Justice did not join). An important debate and clarification may thus be hoped for in 1954.

From this rapid survey of the past decade, we see the immense difficulty of fitting new bottles for new wine in a federal community of free enterprise on a case-by-case basis. None of the old concepts fit. The pipelines cannot be divested of their gas as the railroads were stripped of their coal and lumber properties. The gas flow is continuous, like that of electric transmission. Unique among transport enterprises, it is a one-way flow; there is no return cargo, or even return in ballast. There is substantially no variety in the cargo. When the line is ready, the gas must be at the flange; when the gas arrives at the destination, the taker must be ready at the flange. These requirements are more imperative than the needs of a trading ship, which the lighters must attend in the roadstead as soon as she arrives and has the hatches open. The carrier does not maintain warehouses for gas before shipment or after arrival. Proper service in fact requires integrated management and movement from the gathering field to the point of consumption. Distinctions based on state boundaries, high

¹⁹ *Palmer Oil Corp. v. Amerada Petroleum Corp.*, 343 U.S. 390 (1952).

²⁰ *Interstate Natural Gas Co. v. FPC*, 331 U.S. 682 (1947).

²¹ *Wisconsin v. FPC*, 205 F.2d 706 (D.C. Cir. 1953) (Judge B. C. Clark dissenting).

²² *Phillips Petroleum Co. v. Wisconsin*, 346 U.S. 896 (1953).

²³ *Phillips Petroleum Co. v. Wisconsin*, 346 U.S. 934 (1954).

or low pressures, pumping, storage and distribution are purely artificial devices for accommodating the interested political parties. It would seem a good field for interstate compacts like the stream-regulating agreements, the fisheries pacts, the port authorities and the water-front commissions. If the gathering state and the consuming state should come together on regulation of the industry which affects them both, the interstate aspect, which consists essentially of pumping the product along the pipeline from state to state, could have very little federal interest.

The absurd hazards of the present lack of organized system are illustrated in the daily press. An instance is *Skelly Oil Co. v. Phillips Petroleum Co.*²⁴ Michigan-Wisconsin Pipeline was a huge enterprise possessing certificates of convenience and necessity from Texas (the gas-collecting state) and Michigan and Wisconsin (the distribution states), and had contracted with Phillips for its gas supply in Kansas, Oklahoma and Texas. Phillips in turn contracted with Skelly, Stanolind and Magnolia for gas to resell to Michigan-Wisconsin, with a provision that the contracts could be canceled on December 1 unless Phillips obtained its certificate of convenience and necessity by that date. The officials gave the license on November 30, but withheld the announcement until December 2; however, Skelly canceled on December 1. Litigation ensued, and on reaching Washington the Court declared that there was no federal question.

Canceling dates were also involved in the race between Northeastern and Algonquin to serve New England with two gas pipelines from distant Texas. Northeastern was built first. A few landowners in Dutchess County, New York, resisted the Algonquin acquisition of its right of way. The proceedings dragged along until it could be said that Algonquin's certificate of public necessity should be canceled; that question came before the federal court in Philadelphia. The court decided that the certificate was no longer valid, thus possibly depriving the company of the right to condemn its right of way in Dutchess County.

Gas transportation is probably a real hazard for the communities through which the gas is silently and continuously pumped. Primary responsibility for guarding and patrolling is on the pipeline company. But emergencies may arise. The pipeline workers and the guards may strike. Who then guards the community; who pays for the public police protection furnished? During a strike in 1953, the press reported that the locked valves were tampered with, and that many households were endangered by irregular gas pressures.²⁵ Judges are

²⁴ 339 U.S. 667 (1950).

²⁵ N.Y. Times, Sept. 3, 1953, p. 29, col. 3.

slow to apply old statutes to new crimes; it may be necessary to have new legislation for pipeline offenses, similar to those enacted for tampering with railway cars, aircraft and vessels.²⁶

II

AVIATION LAW

1953 was the fiftieth year since the Wright brothers achieved their first man-carrying flight at Kittyhawk in a powered plane, and the twenty-fifth year since Hotchkiss produced the first book on *Aviation Law* in this country. A rapid review of these five decades reminds us that the first decade—to 1913—accomplished nothing from the legal viewpoint with the possible exception of the Paris Conference of 1910 and its declaration for freedom of the air.²⁷ The next decade embraced the First World War, and firmly established the principle of air sovereignty; it saw the organization of European flying under the CINA or secretariat of the Paris Convention for International Navigation by Air.²⁸ The third decade was constructive; the Citeja was organized and produced the highly successful Warsaw Convention in 1929²⁹ and the two Rome Conventions in 1933. Our Congress adopted the Air Commerce Act in 1926,³⁰ and the Commissioners on Uniform State Laws adopted several texts which are now law in many states.³¹ In addition, the air mail system was started. The fourth decade, aroused by Lindbergh's marvelous solo flight to Paris and his later flights with his intrepid wife, saw the beginnings of the present air transport system, and the subsequent federal regulatory arrangements of the Civil Aeronautics Act of 1938.³² The fifth decade, now ended, burgeoned into an incredible activity after the huge military air effort of the Second World War; the progress of events since 1942 has been traced annually in this *Survey*. At last

²⁶ Pipeline literature for the year under consideration included the following: Wolbert, *American Pipelines: Their Industrial Structure, Economic Status and Legal Implications* (1952); Note, *Control of Entry into the Natural Gas Pipeline Industry*, 28 Ind. L.J. 587 (1953); Moses, *Book Review*, 31 Texas L. Rev. 87 (1952) (discussing current problems and arguing against the separation of the larger pipeline companies from the big oil companies).

²⁷ Cooper, *The International Air Navigation Conference, Paris 1910*, 19 J. of Air L. & Comm. 127 (1952).

²⁸ Cooper, *U.S. Participation in Drafting Paris Convention 1919*, 18 J. of Air L. & Comm. 266 (1951).

²⁹ See 49 Stat. 3000 (1934), U.S. Treaty Series 876, 1934 U.S. Av. Rep. 245.

³⁰ 44 Stat. 568 (1926), 49 U.S.C. § 171 et seq. (1946).

³¹ See, e.g., *Uniform Aeronautics Act* (1922); *Uniform Air Licensing Act* (1930); *Uniform Aeronautics Regulatory Act* (1935); *Uniform Airports Act* (1935).

The above Acts were withdrawn by the National Conference in 1943 but remain enacted in many states. 11 Un. Laws Ann. (Supp. 1950).

³² 52 Stat. 973 (1938) 49 U.S.C. §§ 401-681 (1946).

the legal pace seems to be moderating for 1953 was not as exciting a year as its immediate predecessors.

International Regulation.—During the year the International Civil Aviation Organization (ICAO)⁸³ completed the fifteenth of its *Annexes of International Standards and Recommended Practices*, and developed its system of reporting which member States have accepted without alteration, and what exceptions are being made by those States which find themselves unable at this time to adhere in all respects. Some States reported practices not merely accepting these standards but going somewhat beyond them;⁸⁴ revision and improvement of the standards is a continuing process. The abandonment of the system of "weather ships" patrolling the North Atlantic was under consideration, as the remarkable safety record of that route did not seem to justify the elaborate organization for rescue in case of accident. An added factor in such consideration is the passage of planes at the steady rate of 10,000 or more every year—an average of a trip every hour or less—which shows that ample weather reports can be had from the planes themselves. The idea that ships at sea and airplanes over the sea could be organized into a mutual safety system seemed to be fading; and it might be remarked that the Aviation Salvage at Sea Convention, so enthusiastically prepared and signed in 1938,⁸⁵ has never received even one ratification.

Accident Litigation.—At the close of 1952, the New York Appellate Division reduced the *Goepp* verdict to the Warsaw limit figure of \$8,300,⁸⁶ thus in effect reversing the jury finding that the air carrier had committed a "willful misconduct or its equivalent" in the management of the air transport in which the passenger was riding. This leaves the *Ulen* case as the only present instance of a jury finding, in a Warsaw Convention "international carriage" case, of damages in excess of the \$8,300 limit affirmed by an appellate court.⁸⁷

The case of Mrs. Ross (Jane Froman) and her fellow passenger, Gipsy Markoff, seeking damages in excess of the Warsaw limit for personal injuries in the Lisbon accident, was finally tried and the

⁸³ The ICAO's headquarters is located in the International Aviation Building, Montreal, Canada.

⁸⁴ See 1952 U.S. & Can. Av. Rep. 573-99, comparing U.S. regulations with ICAO standards.

⁸⁵ See 1938 U.S. Av. Rep. 253.

⁸⁶ *Goepp v. American Overseas Airlines, Inc.*, 281 App. Div. 105, 117 N.Y.S.2d 276, 1952 U.S. Av. Rep. 586 (1st Dep't 1952), *aff'd*, 305 N.Y. 838, 114 N.E.2d 379, cert. denied, 346 U.S. 874 (1953).

⁸⁷ *American Airlines, Inc. v. Ulen*, 1948 U.S. Av. Rep. 161 (D.D.C. 1948) (jury charge), *aff'd*, 186 F.2d 529, 1949 U.S. Av. Rep. 338 (D.C. Cir. 1949).

jury failed to find "willful misconduct" in the management of the air transport, returning a verdict of \$8,300 in each case.³⁸

In England, a "Warsaw" case, raising the issue of "willful misconduct" in the management of the flight, was settled while the jury deliberated, the plaintiff accepting the English Warsaw figure of £ 2,900.³⁹ Thus the possibility of obtaining unlimited damages in international accidents governed by the Warsaw Convention was in practice turning out to be difficult of attainment.

The first passenger-death case in the National Airport accident of 1949 was tried before a jury to decide the liability of civilian defendants Eastern Air Lines and Captain Rios Bridoux of Bolivia. Simultaneously, the court alone passed on the defendant United States' liability as employer of the personnel in the airport control tower. Although the accident reports had tended to blame Captain Bridoux and to exonerate the airline and the towermen, the result of the trial was exactly opposite. Captain Bridoux, who appeared and testified, was exonerated while the airline and towermen were both found at fault.⁴⁰

Scheduled-Airline Accidents.—Domestic carriers had six accidents. On a stormy night in February, a National Airlines DC-6 with forty-six passengers was unaccountably lost in the Gulf between Tampa and New Orleans;⁴¹ all the life rafts were found floating and inflated, adding to the doubt. In a rain squall in May, Delta lost a DC-3 transport in a skidding belly landing near Shreveport; nineteen of the twenty-four occupants were lost.⁴² Nonscheduled carriers had a very good year, except for some military personnel flights.

On the other side of the picture, the number of flights safely accomplished, and the number of persons transported, broke all records. Over 10,000 passages were made across the North Atlantic, and a nearly equal number across various parts of the Pacific. New York and Chicago were connected every hour on the hour. The number of air passengers exceeded the number of Pullman railway passengers, both means of transport being fully booked up most of the time, with ten or more streamliners running nightly between Chicago and New York. The tide of travel was high at home and abroad, the ocean passengers by ship exceeding 900,000 and by air 300,000.⁴³

³⁸ *Ross v. Pan American Airways, Inc.*, 123 N.Y.S.2d 263, 1953 U.S. & Can. Av. Rep. 586 (Sup. Ct. 1953).

³⁹ *Horabin v. BOAC*, [1952] 2 All E.R. 1016, 1952 U.S. & Can. Av. Rep. 549 (Q.B.).

⁴⁰ *Union Trust Co. v. Eastern Air Lines*, 1953 U.S. & Can. Av. Rep. 135 (D.D.C. 1953) (jury charge); *Union Trust Co. v. United States*, 113 F. Supp. 80, 1953 U.S. & Can. Av. Rep. 147 (D.D.C. 1953).

⁴¹ N.Y. Times, Feb. 15, 1953, p. 1, col. 8.

⁴² N.Y. Times, May 18, 1953, p. 1, col. 5.

⁴³ Warner, *Civil Aviation in 1952*, 8 ICAO Bull. No. 5 at 5 (June-July 1953).

Treaty Movement.—Argentina joined the large group of States which have accepted the Warsaw Convention. An ICAO legal committee conference at Rio opened with expressions of satisfaction with the Warsaw Convention, but after some days wrote an amendatory protocol, which a State, in its discretion, may or may not annex to the Convention, proposing three major lines of change: (1) simplifying the ticket requirements somewhat in the manner of the British Carriage by Air Order of 1951;⁴⁴ (2) eliminating *faute lourde* or "willful misconduct" as a basis for unlimited damages, which would only be available upon proof of willful intent to damage; and (3) increasing the "absolute" liability damage limit for injury and death by 60 per cent, from 125,000 to 200,000 gold francs, or in dollars from \$8,300 to \$13,700. This proposal will next be prepared for a diplomatic conference, where it will be offered for signature; ratifications and enactments may follow upon that future event.⁴⁵

China rejoined the ICAO, from which it had withdrawn after the removal of its seat of government to Formosa. Japan was admitted.⁴⁶ The member States totaled sixty-one, several of which are not members of the United Nations: In the continued absence of Russia and its satellites, the ICAO is one of the most widely representative organizations of the free world.

At the year's end, India gave twelve months' notice of the denunciation of its bilateral treaty of 1946 with the United States. This was thought to be a prelude to negotiation of a new treaty, whereby India would impose limitations on United States airline flights across India. Dutch and British flights have already been curtailed by that State. Other bilateral disputes were coming to public attention. The United States did not want the Canadians to fly to Mexico City via Tampa. The French wanted to fly from Paris via New York to Mexico, picking up passengers in New York, as our United States airlines now fly via Paris to other European airports, picking up passengers in Paris. Japan re-entered the air transport field in the Pacific area;⁴⁷ Germany planned for a future of air travel.

ICAO continued to be very active with its documentation remaining an important factor. Mr. E. Pepin of France retired as Legal Director,⁴⁸ leaving an enviable record of smooth organization of legal matters. Shri P. K. Roy of India succeeded him.⁴⁹

Aviation Literature.—The outstanding book of 1953 was pub-

⁴⁴ 1952 U.S. & Can. Av. Rep. 151.

⁴⁵ 8 ICAO Bull. No. 7 at 29 (Nov. 1953).

⁴⁶ 8 ICAO Bull. No. 6 at 11 (Aug.-Oct. 1953).

⁴⁷ 8 ICAO Bull. No. 5 at 11 (June-July 1953).

⁴⁸ 8 ICAO Bull. No. 5 at 4 (June-July 1953).

⁴⁹ 8 ICAO Bull. No. 1 at 26 (Jan.-Feb. 1953).

lished in English at The Hague, the work of a Dutch scholar, K. M. Kamminga; entitled *The Aircraft Commander in International Law*, the book reviews a great number of the problems of international aviation.

In the United States, the literature was scanty. The Air Coordinating Committee's *Annual Report*, expressed as usual with stiff governmental and anonymous phrases, provided useful information.⁵⁰ The American Bar Association's Committee on Aeronautical Law furnished a good account of the nongovernmental aspects. President Edward Warner of ICAO offered an informative review of that organization's work since it took hold in 1946.

There was no 1953 supplement to Shawcross and Beaumont's English work on *Air Law*, but one is promised for 1954. An excellent French collection of the international aviation conventions and the laws of the French Union was put out by Drs. Lacombe and Saporta; a similar work in German, edited by Dr. Alex Meyer, appeared under the imprint of the Forschungstelle fuer Luftrecht of the University of Cologne, while a fine set of Spanish texts came from the Law Faculty of the National University of Cordoba, in Argentina, directed by Drs. Damianovich-Oliveira and Mosquera-Ubios. Prints of the new Italian Code for sea and air have been available for several years. Thus this mass of new international material is rapidly becoming available to students and businessmen, lawyers and judges.

The *Journal of Air Law and Commerce* and the *United States and Canadian Aviation Reports* appeared in their usual quarterly parts and furnished a forum for discussion of current American problems, the texts of new statutes, law cases and regulatory decisions.

⁵⁰ 1953 U.S. & Can. Av. Rep. 280.

ADMIRALTY AND SHIPPING

NICHOLAS J. HEALY, 3rd

NO SIGNIFICANT legislation affecting shipping was enacted by Congress during 1953 and little progress was made in the task of modernizing the admiralty practice, begun several years ago. However, the United States Supreme Court handed down several decisions of importance to the marine industry and its revived concern with problems of maritime law continued to be apparent.

General Problems.—Shipping, and American shipping in particular, remained in a depressed state. The Korean truce resulted in the redelivery of many of the privately owned vessels which had been under time charter to the Military Sea Transportation Service. Stagnation in private international trade kept freight and time charter rates at marginal levels and an increasing number of ships built during World War II were being withdrawn from active service, resulting in widespread unemployment among seamen.

The privately owned American-flag merchant fleet decreased in number to 1,251 ocean-going vessels of 1,000 gross tons or more, of which 808 were dry cargo and combination ships and 443 were tankers. The Government was the owner of 2,091 ocean-going vessels, but of these 2,003, consisting mainly of cargo ships built during World War II, were in the national defense reserve fleet.

Future prospects were bleak; at the year's end, not one American shipyard was building a single ocean-going passenger or cargo ship for private operators, nor were any orders placed for seagoing merchant vessels with American yards during the year.¹

The United States Court of Appeals for the Fourth Circuit affirmed the forfeiture of the tanker Meacham² for violation of the statutes prohibiting the sale of American vessels to foreign interests without the approval of the former Maritime Commission.³ The

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¹ The statistics cited in this section were obtained from Research Rep., American Merchant Marine Institute, Inc. (Dec. 10, 1953).

² Meacham Corp. v. United States, 207 F.2d 535 (4th Cir. 1953).

³ Shipping Act of 1916, 39 Stat. 729 (1916), as amended, 40 Stat. 900 (1918), 41 Stat. 1008 (1920), 52 Stat. 964 (1938), 46 U.S.C. § 802 (1946); 39 Stat. 730 (1916), as amended, 52 Stat. 964 (1938), 46 U.S.C. § 808 (1946) which provides, in part, that no corporation shall be deemed a citizen within the meaning of the Act unless the controlling interest therein is owned by citizens; that the controlling interest in a corporation shall not be deemed owned by citizens if title to a majority of its stock is not vested in such citizens, free from any trust or fiduciary obligation in favor of aliens, or if a majority of the voting power is not vested in citizens, or if through any contract or understanding the majority of the voting power may be exercised directly

majority found that full disclosure of the facts had not been made to the Commission and that although title to the vessel had been taken in the name of an American corporation, the beneficial interest and control had actually been passed to citizens of Nationalist China. Chief Judge Parker dissented, stating that in his view the United States, after making the sale through the Maritime Commission, was seeking to "retain the price paid and then have the vessel forfeited on the ground that the Commission did not approve the sale which the Commission itself made."⁴ Many similar forfeiture proceedings were pending at the end of 1953.⁵

New York's perennial water-front scandals again made headlines. This time, however, the disclosures were so offensive to the public's sense of decency that they resulted in the establishment of a Water-front Commission, under the joint control of the States of New York and New Jersey.⁶ The compact pursuant to which the Commission was created provides for the licensing of pier superintendents, hiring agents, "boss" stevedores and port watchmen and for the registration of longshoremen. It outlaws the practice of "public loading," as against public policy, abolishes the much-criticized "shape-up," and establishes, in its place, a system of employment-information centers for the hiring of longshoremen.

During the year ships' officers prepared themselves for sailing under the new International Rules for the Prevention of Collision at Sea,⁷ which were to become effective on January 1, 1954.

By a four-to-three decision in a test case, the United States

or indirectly in behalf of aliens; that it shall be unlawful, without the approval of the Maritime Commission, to sell to aliens, or transfer to foreign flag or registry, any vessel owned, in whole or in part, by citizens and documented under the laws of the United States, and that any vessel sold in violation of the statute shall be forfeited. See also Rev. Stat. § 4172 (1875), 46 U.S.C. § 41 (1946) which provides for the forfeiture of American vessels sold, "by way of trust, confidence, or otherwise," to aliens, where the sale is not reported to the authorities.

⁴ *Meacham Corp. v. United States*, 207 F.2d 535, 548 (4th Cir. 1953).

⁵ See 1953 Am. Mar. Cas. 1539, where there appears a table listing twenty-nine seizures made between March 5 and August 31, 1953, on charges similar to those resulting in forfeiture of the *Meacham*.

⁶ The Commission was established pursuant to the Waterfront Commission Compact between New York and New Jersey, authorized by N.Y. Laws 1953, c. 882, amended by c. 883; N.J. Laws 1953, c. 202, amended by c. 203. The compact was given congressional approval by Pub. L. No. 252, 83d Cong., 1st Sess. (Aug. 12, 1953), 67 Stat. 541 (1953). Its constitutionality was upheld by a three-judge statutory court in *Local 1346, ILA v. New Jersey-New York Waterfront Comm'n*, 1953 Am. Mar. Cas. 1976 (S.D.N.Y. 1953).

⁷ Adopted at the 1948 International Safety of Life at Sea Conference at London and approved by Congress. 65 Stat. 406 (1951), 33 U.S.C. §§ 143 et seq. (Supp. 1952). The text of the new rules appears at 1952 Am. Mar. Cas. 214 and in Proc. of Merchant Marine Council, U.S. Coast Guard, Vol. 10, Nos. 4, 5, 6, p. 67 (April, May, June 1953), as well as in a specially prepared supplement to Griffin, *Collision* (1949).

Supreme Court ruled that the Government was not legally responsible for the tragic Texas City disaster of 1947.⁸ According to the majority opinion, the Federal Tort Claims Act⁹ does not render the United States liable for acts of discretion in the performance of governmental functions or duties, even where the discretion is abused. The plaintiffs had sought to impose liability on the United States as manufacturer of fertilizer-grade ammonium nitrate produced in converted wartime munitions plants, and for improper performance by the Coast Guard of its duties in supervising the handling of the nitrate, the explosion of which aboard the S.S. Grandcamp caused the disaster.

Admiralty Jurisdiction, Practice and Procedure.—The constitutionality of the Act for the Extension of Admiralty Jurisdiction¹⁰ was upheld by the Court of Appeals for the Ninth Circuit, which also decided that since the Act was remedial in nature, it could be applied retrospectively to causes of action arising prior to its passage.¹¹ On the constitutional issue the court relied on the earlier decisions which recognized the power of Congress to modify, alter or supplement the maritime law as experience or changing conditions might require.¹²

The United States Supreme Court has not as yet settled the unfortunate conflict between the first and the third circuits on the question whether a cause of action under the general maritime law arises "under the Constitution, Laws or Treaties of the United States,"¹³ so as to confer jurisdiction on the federal courts, on the civil side, in the absence of diversity of citizenship.¹⁴ Meanwhile, the debate continued.¹⁵

⁸ *Dalehite v. United States*, 346 U.S. 15 (1953). See also A/S J. Ludwig Mowinckels *Rederi v. Accinanto, Ltd.* (The Ocean Liberty), 199 F.2d 134 (4th Cir. 1952) and *The Ocean Liberty*, 1953 Am. Mar. Cas. 925 (France, Tribunal de Commerce de la Seine, 1st Div., 1952), both of which dealt with the explosion of a cargo of fertilizer-grade ammonium nitrate on board the S.S. Ocean Liberty at Brest shortly after the Texas City disaster.

⁹ 28 U.S.C. § 1346 (Supp. 1952).

¹⁰ 62 Stat. 496 (1948), 46 U.S.C. § 740 (Supp. 1952).

¹¹ *United States v. Matson Navigation Co.*, 201 F.2d 610 (9th Cir. 1953).

¹² *Detroit Trust Co. v. The Thomas Barlum*, 293 U.S. 21 (1934); *O'Donnell v. Great Lakes Dredge & Dock Co.*, 318 U.S. 36 (1943). On the constitutionality of the Act see *American Bridge Co. v. Tug Gloria O*, 98 F. Supp. 71 (E.D.N.Y. 1951); 1948 Annual Surv. Am. L. 602; Knauth, *The Landward Extension of Admiralty Jurisdiction: The 1948 Statute*, 35 Cornell L.Q. 1 (1949); Rault, *Statutory Extension of Admiralty Jurisdiction in Tort*, 24 Tulane L. Rev. 453 (1950). But cf. Vogel, *Extension of Admiralty and Maritime Jurisdiction*, 16 Brooklyn L. Rev. 191 (1950).

¹³ 28 U.S.C. § 1331 (Supp. 1952).

¹⁴ See *Doucette v. Vincent*, 194 F.2d 834 (1st Cir. 1952), 31 Texas L. Rev. 585 (1953); 1952 Annual Surv. Am. L. 378, 28 N.Y.U.L. Rev. 406 (1953); *Jordine v. Walling*, 185 F.2d 662 (3d Cir. 1950).

¹⁵ See *Moore-McCormack Lines v. Amirault*, 202 F.2d 893 (1st Cir. 1953) where the court, by way of dictum, adhered to its decision in *Doucette v. Vincent*, *supra* note 14, and *New York Cent. R.R. v. Rodermond Industries, Inc.*, 113 F. Supp. 435 (D.N.J. 1953), following *Jordine v. Walling*, *supra* note 14.

Another conflict which has developed is with respect to the power of a state court to entertain a proceeding for partition of vessel property. The Supreme Court of California decided that at least since the 1948 revision of the Judicial Code, state courts have concurrent jurisdiction of partition actions.¹⁶ The Supreme Court of the State of Washington had previously held that such a proceeding is essentially one in rem against a vessel and that under settled principles it could properly be brought only in a federal district court, sitting in admiralty.¹⁷ The California Supreme Court's ruling seems to have been based upon the change in the wording of the saving clause in the 1948 revision¹⁸ and its implications are somewhat startling. If carried to its logical conclusion the California view would permit state legislatures to grant to their own courts jurisdiction to enforce maritime liens, the one field in which the power of the federal admiralty courts has hitherto been considered exclusive.¹⁹

While the choice of words used by the revisers of the Judicial Code was perhaps unfortunate, there is no indication that they intended to alter the substance of the saving clause as originally enacted.²⁰ While the United States Supreme Court, in January 1954, upheld the California decision, the majority considered the state court proceeding one purely in personam, affecting only the interests of the parties before the Court, and not the vessel as a res. Fortunately, it did not hold that the 1948 revision had any effect on the exclusive jurisdiction of the admiralty courts in proceedings in rem. To have done so would have meant the end of uniformity in the enforcement of maritime liens.

Several important decisions involving the *Jensen*²¹ principle were

¹⁶ *Madruza v. Superior Court*, 40 Cal.2d 65, 251 P.2d 1 (1952), 53 Col. L. Rev. 746 (1953), aff'd, 22 U.S.L. Week 4083 (U.S. Jan. 19, 1954).

¹⁷ *Cline v. Price*, 39 Wash.2d 816, 239 P.2d 322 (1951), noted in 1952 Annual Surv. Am. L. 379, 28 N.Y.U.L. Rev. 407 (1953).

¹⁸ The original Judiciary Act of 1789 gave federal district courts exclusive jurisdiction of all civil admiralty and maritime causes, "saving to suitors . . . the right of a common law remedy, where the common law is competent to give it." 28 U.S.C. § 41(3) (1946). The 1948 revision of the Judicial Code changed the language of the saving clause from "common law remedy" to "all other remedies to which they are otherwise entitled." 28 U.S.C. § 1333(1) (Supp. 1952).

¹⁹ *The Moses Taylor*, 4 Wall. 411 (U.S. 1866). The one recognized exception to this rule is that a state agency may maintain an in rem proceeding against maritime property in a state court for violations of state penal laws. See *C. J. Hendry Co. v. Moore*, 318 U.S. 133 (1943).

²⁰ See Revisers' Notes to 28 U.S.C. § 1333 (Supp. 1952); H.R. Rep. No. 308, 80th Cong., 1st Sess. A 117-18 (1947); Sen. Rep. No. 1559, 80th Cong., 2d Sess. 1-2 (1948). See Bergren, *Effects of Recent Legislation upon the Admiralty Law*, 17 Geo. Wash. L. Rev. 353 (1949); Black, *Admiralty Jurisdiction: Critique and Suggestions*, 50 Col. L. Rev. 259 (1950).

²¹ *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917).

handed down during the year. In one, the United States Supreme Court held that the Federal Longshoremen's and Harbor Workers' Compensation Act²² afforded the exclusive remedy in the case of railway employees working on freight cars while being transported on car-transfer floats.²³ It was therefore determined that no recovery could be had under the Federal Employers' Liability Act.²⁴ The lower court had decided that the Longshoremen's Act was applicable only when the employee was injured on navigable waters while engaged in maritime employment.²⁵ This view was rejected by the Supreme Court, which determined that it was sufficient if the employee was injured on navigable waters while engaged in an employment other than that as a member of the crew of a vessel. Four justices dissented, taking the position that locality is not enough and that the nature of the employment is of equal importance.²⁶

The doctrine of *Belden v. Chase*²⁷ was given its final death blow by the United States Supreme Court in *Pope & Talbot, Inc. v. Hawn*.²⁸ Hawn, an employee of a ship repair company, had been injured while doing carpentry work aboard a vessel berthed at a pier in the Delaware River. He brought a civil action in the local federal district court, alleging that his injuries resulted from the unseaworthiness of the vessel and the negligence of her owners. The latter denied both charges, set up contributory negligence as a defense to each, and brought in Hawn's employer, the Haenn Ship Ceiling & Refitting Corporation, as a third party defendant. The shipowners alleged that Haenn's negligence had caused the injury, and that they were there-

²² 44 Stat. 1424 (1927), 33 U.S.C. §§ 901 et seq. (1946).

²³ *Pennsylvania R.R. v. O'Rourke*, 344 U.S. 334 (1953).

²⁴ 27 Stat. 531 (1893), 45 U.S.C. §§ 1 et seq. (1946).

²⁵ *Pennsylvania R.R. v. O'Rourke*, 194 F.2d 612 (2d Cir. 1952).

²⁶ *Pennsylvania R.R. v. O'Rourke*, 344 U.S. 334, 342 (1953).

²⁷ 150 U.S. 674 (1893), holding that the application of the admiralty rule of divided damages depended upon choice of forum, and that contributory negligence was a complete bar to recovery in suits brought in common-law courts on maritime causes of action. To the same effect see *Johnson v. United States Shipping Board Emergency Fleet Corp.*, 24 F.2d 963 (2d Cir. 1928); *In re Pennsylvania R.R.*, 48 F.2d 559 (2d Cir.), cert. denied, 284 U.S. 640 (1931); *United States v. Norfolk-Berkley Bridge Corp.*, 29 F.2d 115 (E.D. Va. 1928); *Maleeny v. Standard Shipbuilding Corp.*, 237 N.Y. 250, 142 N.E. 602 (1923); *Boles v. Munson S.S. Lines*, 260 N.Y. 516, 184 N.E. 74 (1932); *Stoney v. Norman Stevedoring Co.*, 209 App. Div. 747, 205 N.Y. Supp. 111 (1st Dep't 1924); *Wilkins v. Foss Launch & Tug Co.*, 20 Wash.2d 422, 147 P.2d 524 (1944). *Contra*: *W. E. Hedger Transportation Corp. v. United Fruit Co.*, 198 F.2d 376 (2d Cir.), cert. denied, 344 U.S. 896 (1952); *Gordon v. Project Construction Corp.*, 110 N.Y.S.2d 209 (Sup. Ct. 1952); *Intagliata v. Shipowners & Merchants Towboat Co.*, 26 Cal.2d 365, 159 P.2d 1 (1945). In these cases the courts refused to follow *Belden v. Chase*, supra, and held that contributory fault did not bar a recovery in a maritime action at law. The problem is discussed in *Sprague, Divided Damages*, 6 N.Y.U.L.Q. Rev. 15 (1928); *Derby, Divided Damages in Maritime Cases*, 33 Va. L. Rev. 289 (1947).

²⁸ 74 Sup. Ct. 202 (1953).

fore entitled to a recovery over by way of contribution or indemnity. The jury found that the vessel was unseaworthy, that the shipowners, the repair company and Hawn himself were negligent, that the latter's negligence had contributed to his injuries to the extent of 17½ per cent, and that his damages amounted to \$36,000. The trial court accordingly entered judgment against the shipowners for \$29,700 (82½ per cent of \$36,000) and also entered judgment for contribution in favor of the shipowners against Haenn.²⁹ The court of appeals affirmed Hawn's judgment against the shipowner, but reversed the judgment of contribution against Haenn.³⁰ The Supreme Court affirmed the decision of the court of appeals. Hawn's cause of action was based on a maritime tort, which, as the majority said, is "a type of action which the Constitution has placed under national power to control in 'its substantive as well as its procedural features. . .'" and that "while states may sometimes supplement federal maritime policies, a state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretative decisions of this Court."³¹

An important decision of the United States Supreme Court was one holding that the nature of the cargo is not a necessary criterion for determining whether a privately owned vessel is "employed as a merchant vessel" within the meaning of the Suits in Admiralty Act.³² A shipowner claimed against the Government for additional charter hire and for the loss of its vessel, the *Portmar*, resulting from compliance by the master with military orders in wartime. The Court of Appeals for the Second Circuit³³ had decided that the *Portmar* was not employed as a merchant vessel, since she was carrying military supplies and equipment, but the Supreme Court reversed,³⁴ holding that the Suits in Admiralty Act and the Public Vessels Act³⁵ should be construed together as more or less coextensive, and that the phrase "employed as a merchant vessel" refers simply to privately owned vessels operated for the United States under charter.³⁶ The Court said that such a test lent itself to a "simple and expeditious application,

²⁹ *Hawn v. Pope & Talbot, Inc.*, 99 F. Supp. 226 (E.D. Pa. 1951) and 100 F. Supp. 338 (E.D. Pa. 1951).

³⁰ 198 F.2d 800 (3d Cir. 1952). Contribution was denied on the basis of *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282 (1952).

³¹ *Pope & Talbot, Inc. v. Hawn*, 74 Sup. Ct. 202, 205 (1953), quoting from *Panama R.R. v. Johnson*, 264 U.S. 375, 386 (1924).

³² 41 Stat. 525 (1920), 46 U.S.C. §§ 741 et seq. (1946).

³³ *Calmar S.S. Corp. v. Scott*, 197 F.2d 795 (2d Cir. 1952).

³⁴ *Calmar S.S. Corp. v. United States*, 345 U.S. 446 (1953).

³⁵ 43 Stat. 1112 (1925), 46 U.S.C. §§ 781 et seq. (1946).

³⁶ See *The Western Maid*, 257 U.S. 419 (1922); *Bradley v. United States*, 151 F.2d 742 (2d Cir. 1945), cert. denied, 326 U.S. 795 (1946).

reasonably predictable in result," and that the opposite rule would relegate a claimant to the Court of Claims instead of the federal district courts, which are the usual forums for the hearing of maritime controversies.

Chief Justice Vinson's death added to the delay in the adoption of a revised set of general admiralty rules by the United States Supreme Court. Meanwhile, the Maritime Law Association's Committee on the Supreme Court Admiralty Rules completed its proposed revision. Its recommendations (with three out of fourteen members of the Committee dissenting) were approved in principle by the Association itself.⁸⁷ The Standing Committee on Admiralty and Maritime Law of the American Bar Association meanwhile pressed for the immediate adoption of the most badly needed reforms—the correction of General Admiralty Rule 58 so as to permit the service of subpoenas on witnesses required at admiralty trials at any place, whether within or without the district, within 100 miles of the place of trial, and the correction of General Admiralty Rule 54 so as to provide that limitation-of-liability proceedings may be brought in the district in which the vessel may be, in instances where suit has been commenced against the shipowner in some other district.

Carriage of Goods.—Two novel cases involving the \$500 limitation of liability under the Carriage of Goods by Sea Act⁸⁸ came before the courts. In *The Edmund Fanning*⁸⁹ the Army shipped ten large locomotives at Bremen, consigned to Korea, under a bill of lading incorporating the Act by reference. The carrier's tariff contained a rate per ton on small locomotives, but those of the size shipped on the *Fanning* were subject to a flat freight charge of \$10,000 per unit of locomotive and tender. The equipment having been destroyed in a disastrous fire found due to neglect on the part of a managing agent of the carrier, the United States Court of Appeals for the Second Circuit held that the carrier's liability should be limited to \$5,000, or \$500 per unit of locomotive and tender. In the second case the District Court for the Southern District of New York refused to apply the \$500 limitation where the goods had been stowed on deck,

⁸⁷ See Maritime Law Association of the United States Doc. Nos. 369, 371 (1953).

⁸⁸ 49 Stat. 1210 (1936), 46 U.S.C. § 1304 (1946). The \$500 limitation applies "per package" in the case of packaged goods, but in the case of goods not shipped in packages, it applies "per customary freight unit," i.e., the unit upon which the charge for freight is computed, rather than the shipping unit. See *Waterman S.S. Corp. v. United States Smelting, Refining & Mining Co.*, 155 F.2d 687 (5th Cir. 1946); *Middle East Agency v. The John B. Waterman*, 86 F. Supp. 487 (S.D.N.Y. 1949); *The Bill*, 55 F. Supp. 780 (D. Md. 1944); *Stirniman v. The San Diego*, 148 F.2d 141 (2d Cir. 1945).

⁸⁹ *Isbrandtsen Co. v. United States*, 201 F.2d 281 (2d Cir. 1953).

despite the issuance of a "clean" bill of lading, and the carrier had thus been guilty of a deviation.⁴⁰

A fifth circuit decision⁴¹ held that a foreign shipowner was entitled to exoneration under the "fire statute,"⁴² without showing compliance with the American "safety statute,"⁴³ the terms of which are binding only on American owners.

Salvage.—Several interesting salvage cases came before the courts. In one,⁴⁴ the Court of Appeals for the Third Circuit, sitting en banc, held that the Government is not liable for the fault of the Coast Guard in the conduct of rescue operations at sea. The majority opinion was largely based on the effect it would have on the morale and effectiveness of the Coast Guard if the conduct of its personnel in rescue work were "to be scrutinized, weighed in delicate balance, and adjudicated by Monday-morning judicial quarterbacks."⁴⁵ Circuit Judge Kalodner, speaking for the majority, said that "to expose the men in the Coast Guard to the double jeopardy of possible loss of their own lives, and loss of status in their chosen careers, because they failed . . . to select the most desirable of available procedures, or their skill was not equal to the occasion, is unthinkable and against the public interest."⁴⁶ Three dissenting judges took the position that under the Public Vessels Act,⁴⁷ as interpreted by the United States Supreme Court in *The Cavellier*,⁴⁸ the court had no choice, and was obliged to impose liability on the Government for torts committed in the operation of its public vessels.⁴⁹

In *The Batory*,⁵⁰ that vessel was a few miles south of Fire Island, on a voyage from New York to Southampton, when she was circled

⁴⁰ Jones v. S.S. Flying Clipper, 116 F. Supp. 386 (S.D.N.Y. 1953).

⁴¹ Fidelity-Phoenix Fire Insurance Co. v. Flota Mercante Del Estado, 205 F.2d 886 (5th Cir. 1953).

⁴² Rev. Stat. § 4282 (1875), 46 U.S.C. § 182 (1946). The statute provides that no shipowner shall be liable for loss of or damage to cargo by fire, unless caused by his design or neglect. See also The Carriage of Goods by Sea Act, 49 Stat. 1210 (1936), 46 U.S.C. § 1304(2)(b) (1946) which relieves the carrier of liability for fire, "unless caused by the actual fault or privity of the carrier."

⁴³ 37 Stat. 736 (1913), 46 U.S.C. § 463 (1946), providing that, "Every steamer carrying passengers or freight shall be provided with suitable pipes and valves attached to the boiler to convey steam into the hold and to the different compartments thereof to extinguish fires."

⁴⁴ P. Dougherty Co. v. United States, 207 F.2d 626 (3d Cir. 1953). See also Hansen v. United States, 1953 Am. Mar. Cas. 1581 (D. Ore. 1953).

⁴⁵ P. Dougherty Co. v. United States, *supra* note 44 at 634.

⁴⁶ *Id.* at 634-35.

⁴⁷ 43 Stat. 1112 (1925), 46 U.S.C. §§ 781 et seq. (1946).

⁴⁸ Canadian Aviator, Ltd. v. United States, 324 U.S. 215 (1945).

⁴⁹ P. Dougherty Co. v. United States, 207 F.2d 626, 641 (3d Cir. 1953).

⁵⁰ Gdynia-America Shipping Lines, Ltd. v. Lambros Seaplane Base, 115 F. Supp. 796 (S.D.N.Y. 1953).

by a small seaplane, which signaled for assistance. The plane then alighted on the water and the pilot boarded the steamer, where he was invited to remain, since the plane had neither fuel nor compass. The Batory's master then brought the plane aboard, and upon arrival at Southampton it was placed in the custody of the Receiver of Wrecks, in accordance with British law, to await claim by the true owner. The owner of the plane then filed a libel against the shipowner for conversion of the plane, and the shipowner responded with a cross libel for salvage. The plane owner's exceptions to the cross libel were overruled, the court holding that a seaplane is a "vessel" for purposes of salvage.⁵¹

Certiorari was denied by the United States Supreme Court in a case where both lower courts had denied a salvage award to five members of the crew who remained aboard a blazing tanker after most of the officers and crew had abandoned her, and who shut off a flow of oil and extinguished the fire. The lower courts had held that the five were still bound by their articles, and that their services were therefore not of a salvage nature.⁵²

Marine Insurance.—In a decision of considerable importance to marine insurance underwriters the United States Supreme Court reversed the holding of the second circuit court of appeals in *The Portmar*.⁵³ The Court held that the basic "adventures and perils" clause of the usual marine hull policy covers the risk of bombing by enemy aircraft; that while the "free of capture and seizure" warranty releases hull underwriters from liability for damage to a merchant vessel by enemy bombing, the addition of a war-risk rider reinstates the war-risk coverage of the basic "adventures and perils" clause. The circuit court had held⁵⁴ that even if the policy included risk of loss by air attack, the military control over the *Portmar* was so complete and of such indefinite duration that the insured voyage

⁵¹ The court cited 1 U.S.C. § 3 (1946), which defines the word "vessel" as including "every description of watercraft used, or capable of being used, as a means of transportation on water." See also *Reinhardt v. Newport Flying Service Corp.*, 232 N.Y. 115, 1928 U.S. Av. Rep. 4 (1921); *United States v. Cordova*, 89 F. Supp. 298 (E.D.N.Y. 1950); *Watson v. R.C.A. Victor Co.*, 50 Ll. L.L.R. 77, 1935 Am. Mar. Cas. 1251 (Aberdeen Sheriff's Ct. 1934); *Polpen Shipping Co. v. Commercial Union*, 74 Ll. L.L.R. 157, 1943 Am. Mar. Cas. 438 (K.B. 1942); *Noakes v. Imperial Airways, Ltd.*, 29 F. Supp. 412 (S.D.N.Y. 1939); *Dollins v. Pan-American Grace Airways, Inc.*, 27 F. Supp. 487 (S.D.N.Y. 1939); *United States v. Peoples*, 50 F. Supp. 462 (N.D. Cal. 1943); *United States v. Northwest Air Service, Inc.*, 80 F.2d 804 (9th Cir. 1935); *People ex rel. Cushing v. Smith*, 206 App. Div. 726, 199 N.Y. Supp. 942 (3d Dep't 1923).

⁵² *Bertei v. Panama Transport Co.*, 109 F. Supp. 795 (S.D.N.Y. 1952), aff'd, 202 F.2d 247 (2d Cir.), cert. denied, 74 Sup. Ct. 35 (1953).

⁵³ *Calmar S.S. Corp. v. Scott*, 345 U.S. 427 (1953), 39 A.B.A.J. 822.

⁵⁴ 197 F.2d 795 (2d Cir. 1952). The facts are outlined at 1952 Annual Surv. Am. L. 385, 28 N.Y.U.L. Rev. 413 (1953).

could be deemed terminated upon discharge of her outward cargo. The Supreme Court, on the other hand, decided that the naval orders did not indicate such indefinite use of the vessel as to frustrate the purposes of the return leg of the voyage, and found that frustration of the venture did not occur until the Portmar was requisitioned at a later date. The decision brought home the need for modernizing and clarifying the traditional language of the basic marine policy and its numerous riders and warranties.

Seamen and Other Maritime Workers.—Once again far more seamen's injury claims than maritime cases of any other nature came before the courts. Perhaps the most significant of these was *Lauritzen v. Larsen*.⁵⁵ A Danish seaman was employed as a member of the crew of a Danish flag vessel, owned by a citizen and resident of Denmark, under articles signed in New York, which stated that his rights would be governed by Danish law. He was injured aboard the vessel while in the territorial waters of Cuba and sued his employer in the United States District Court for the Southern District of New York. It was held that while the district court had jurisdiction of the subject matter and of the defendant shipowner, the Jones Act⁵⁶ was inapplicable. The Court laid emphasis on the fact that under Danish law the plaintiff was entitled to compensation benefits, which were readily available to him through the Danish consulate. Weighing the various factors to be considered in determining choice of law in such cases, the Court said that the heaviest weight should be given to the ship's flag. While it did not lay down a definite guide to be followed in all Jones Act cases involving alien seamen, the *Lauritzen* decision at least disposed of the conflict in the lower courts on the question whether or not the signing of articles in the United States is sufficient to bring an alien seamen serving on a foreign vessel within the coverage of the Act,⁵⁷ and made it clear that, absent some heavy counterweight, the flag law should be applied in preference to the law of the forum, that of the place of contract or that of the place of the wrongful act.⁵⁸

⁵⁵ 345 U.S. 571 (1953), 31 Texas L. Rev. 889.

⁵⁶ 41 Stat. 1007 (1920), 46 U.S.C. § 688 (1946).

⁵⁷ Compare *Taylor v. Atlantic Maritime Co.*, 179 F.2d 597 (2d Cir. 1950), cert. denied sub nom. *Atlantic Maritime Co. v. Rankin*, 341 U.S. 915 (1951), and *Kyriakos v. Goulondris*, 151 F.2d 132 (2d Cir. 1945), both of which treated the place of contract as of utmost importance, with *Sonnesen v. Panama Transportation Co.*, 298 N.Y. 262, 82 N.E.2d 569 (1948), cert. denied, 337 U.S. 919 (1949), where the court refused to apply the Jones Act, despite the fact that the articles had been signed in the United States.

⁵⁸ The *Lauritzen* decision was distinguished in *Zielinski v. Empresa Hondurena de Vapores*, 113 F. Supp. 93 (S.D.N.Y. 1953), in which the court applied the Jones Act to a claim by an alien seaman injured aboard an Honduran flag vessel in Panamanian

In two other decisions the courts refused to broaden the interpretation previously put upon the Jones Act. In one,⁵⁹ plaintiffs, while on shore leave in Italy, were arrested by United States military police and held in custody for a week, during which time their ship sailed. They brought suit in admiralty against the United States, as owner of the vessel on which they were employed, for false arrest and false imprisonment. The court held that the Jones Act was not broad enough to include these torts, which were unrelated to negligence. Jurisdiction of the subject matter was therefore lacking; the alleged arrest and imprisonment having occurred ashore, the torts, if any, were nonmaritime.

The second case⁶⁰ refused to allow a wife a recovery under the Jones Act against her seaman husband's employer for loss of consortium resulting from allegedly negligent injuries which the husband sustained in the course of his employment.

The doctrine of the *Keen* case⁶¹ was limited by a decision of the second circuit court of appeals which seems to leave more unsettled than ever the question of shipowners' liability in assault cases.⁶² This time the blow was struck with a fist instead of a meat cleaver, and the court refused to allow a recovery against the employer. Judge Learned Hand pointed out that in the assault cases where liability has been imposed "the assault has been either with a dangerous weapon, or the assailant has been independently shown to have been exceptionally quarrelsome, or worse." The distinction is difficult to see; quite obviously a powerful assailant may be able to inflict as much damage with a bare fist as a man of lesser physical prowess can inflict with a weapon. Nor did the *Keen* decision rest on previous evidences of vicious propensities, but rather on an implied warranty by the shipowner that all of the members of the crew were equal in disposition to others of their calling.

waters, where it appeared that an American corporation held all of the stock of the Honduran corporation owning the vessel. The Zielinski decision is merely a logical extension of the holding in *Gerradin v. United Fruit Co.*, 60 F.2d 927 (2d Cir. 1932) where the court applied the Jones Act in favor of an American seaman injured aboard a foreign flag vessel owned directly by an American corporation.

⁵⁹ *Forgione v. United States*, 202 F.2d 249 (3d Cir.), cert. denied, 345 U.S. 966 (1953).

⁶⁰ *Westerberg v. Tide Water Associated Oil Co.*, 304 N.Y. 545, 110 N.E.2d 395 (1953).

⁶¹ *Keen v. Overseas Tankship Corp.*, 194 F.2d 515 (2d Cir. 1952), noted in 1952 Annual Surv. Am. L. 381, 28 N.Y.U.L. Rev. 409 (1953); 21 Ford. L. Rev. 173 (1952); 51 Mich. L. Rev. 583 (1953); 26 So. Calif. L. Rev. 340 (1953); 5 Stan. L. Rev. 814 (1953); 100 U. of Pa. L. Rev. 1045 (1952). See also *Boudoin v. Lykes Bros. S.S. Co.*, 112 F. Supp. 177 (E.D. La. 1953).

⁶² *Jones v. Lykes Brothers S.S. Co.*, 204 F.2d 815 (2d Cir. 1953).

In *Miller v. Standard Oil Co.*⁶³ it was held that the right to maintenance and cure was a matter of anciently established maritime law, and not one of contract or tort within the meaning of the statute⁶⁴ providing that in certain admiralty and maritime causes arising on the Great Lakes, "relating to any matter of contract or tort," either party shall have the right to demand a jury trial.

A recent third circuit decision held that intoxication while on shore leave in a foreign port was not an act of "wilful misconduct" which would bar a recovery for maintenance and cure, and that it was contributory fault which would only mitigate a seaman's recovery for injuries resulting from unseaworthiness.⁶⁵

A conflict in the circuits has developed with respect to the effect of "relinquishment of control" of part of a ship to stevedores. The United States Courts of Appeals for the Second and Third Circuits have taken the position that while the owner is under a duty to provide a seaworthy ship, this duty is a concomitant of control, and he is not liable for the results of unseaworthiness arising after control of the portion of the ship which includes the unseaworthy condition has been surrendered to the stevedores and where it remains with them at the time of the accident.⁶⁶ The ninth circuit, on the other hand, has pointed out that the doctrine was based upon the premise that the shipowner satisfies his duty to provide a seaworthy ship if he has made a diligent inspection; that this premise no longer holds true, in the light of the *Sieracki*⁶⁷ decision, and that since the liability of the owner in unseaworthiness cases does not depend upon negligence but upon his absolute warranty, it follows that it is not affected by relinquishment of control to a stevedore.⁶⁸

The question whether the *Sieracki* doctrine should be extended to include shore workers other than longshoremen was settled by the United States Supreme Court, which decided that the employees of

⁶³ 199 F.2d 457 (7th Cir. 1952), cert. denied, 345 U.S. 945 (1953), 21 Geo. Wash. L. Rev. 483, 52 Mich. L. Rev. 139. See also *Sperbeck v. A. L. Burbank & Co.*, 190 F.2d 449 (2d Cir. 1951).

⁶⁴ 28 U.S.C. § 1873 (Supp. 1952).

⁶⁵ *Bentley v. Albatross S.S. Co.*, 203 F.2d 270 (3d Cir. 1953). See also *Koistinen v. American Export Lines*, 194 Misc. 942, 83 N.Y.S.2d 297 (City Ct. 1948); *Rich v. North Atlantic & Gulf S.S. Co.*, 86 F. Supp. 990 (E.D. Pa. 1949).

⁶⁶ *Grasso v. Lorentzen*, 149 F.2d 127 (2d Cir.), cert. denied, 326 U.S. 743 (1945); *Lopez v. American Hawaiian S.S. Lines*, 201 F.2d 418 (3d Cir. 1953). See also *Brabazon v. Belships Co.*, 202 F.2d 904 (3d Cir. 1953); *Mollica v. Compania Sud-Americana De Vapores*, 202 F.2d 25 (2d Cir.), cert. denied, 345 U.S. 965 (1953), 21 Geo. Wash. L. Rev. 789.

⁶⁷ *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946).

⁶⁸ *Kulukundis v. Strand*, 202 F.2d 708 (9th Cir. 1953); *Pettersen v. Alaska S.S. Co.*, 205 F.2d 478 (9th Cir. 1953).

ship repair firms⁶⁰ are entitled to indemnity if injured through a defect in the ship or its equipment, even though latent.

Admiralty and Shipping Literature.—An unusual number of valuable articles and notes on topics of interest to the admiralty bar appeared in the reviews. One was "Characteristics of United States Maritime Law"⁷⁰ by Arnold W. Knauth, a concise outline prepared primarily for the benefit of foreign maritime lawyers whose practice brings them into occasional contact with American law. Two dealt with general average: Benjamin W. Yancey's "York-Antwerp Rules 1950"⁷¹ and "General Average and the York-Antwerp Rules,"⁷² by Leon S. Felde. A feature of the American law of limitation of ship-owners' liability was thoroughly discussed in "The Personal Contract Doctrine: An Anomaly in American Maritime Law,"⁷³ by John W. Castles, III. Other articles and notes of interest to the maritime bar, in addition to those cited elsewhere in this chapter, included "Judicial Criteria of Navigability in Federal Cases,"⁷⁴ by Francis W. Laurent, "Under Two Flags—Foreign Registry of American Merchantmen,"⁷⁵ and "Maritime Law Applied in Diversity Suits in Federal Law Courts,"⁷⁶

New books on maritime subjects included *Treatises on the Baltic Charterparty*,⁷⁷ by Kjeld Rordam, *Marine Laws—Navigation and Safety*,⁷⁸ compiled and arranged by Frederick K. Arzt, and *Laws and Regulations of the Regime of the High Seas*,⁷⁹ compiled under the direction of Louis B. Sohn. Publication of the sixth five-year digest of *American Maritime Cases*, covering the years 1948 to 1952, inclusive, was announced.

Conclusion.—It will be seen from this brief review of develop-

⁶⁰ Pope & Talbot, Inc. v. Hawn, 74 Sup. Ct. 202 (1953), other aspects of which are discussed at pp. 510-11 supra.

⁷⁰ 13 Md. L. Rev. 1 (1953). The article was originally published in an Italian translation by Professor Torquato Carlo Giannini of the University of Rome, in *Revista del Diritto della Navigazione*, Nos. 1-2, pt. 1, p. 1 (1951).

⁷¹ 6 Loyola L. Rev. 121 (1953). This was originally prepared as a paper for presentation before the Inter-American Bar Association Meeting at Montevideo in November 1951.

⁷² 27 Tulane L. Rev. 406 (1953).

⁷³ 62 Yale L.J. 1031 (1953).

⁷⁴ [1953] Wis. L. Rev. 8.

⁷⁵ Note, 5 Stan. L. Rev. 797 (1953).

⁷⁶ 101 U. of Pa. L. Rev. 545 (1953).

⁷⁷ Briefly reviewed at 1953 Am. Mar. Cas. 455 and 1172.

⁷⁸ Briefly reviewed at 1953 Am. Mar. Cas. 941.

⁷⁹ U.N. Legislative Series Nos. 1, 2. These volumes contain the statutes of some eighty-four nations, states and commonwealths dealing with assertions of control over the continental shelf, contiguous zones and vessels at sea and assertions of criminal jurisdiction of acts committed on board ships and aircraft. The two volumes are briefly reviewed at 1953 Am. Mar. Cas. 1170.

ments in the maritime law during 1953 that a majority of the Supreme Court, as presently constituted, will not tolerate infringements by the states on the paramount power of Congress to enact maritime legislation or on the power of the Court itself to interpret the maritime law prevailing throughout the United States. Another conclusion which may be drawn from a survey of the maritime decisions handed down during the year is that far too many of them concern injuries to seamen and other maritime workers. The need for a carefully studied legislative program in this field becomes more pressing all the time, and many believe that serious consideration should again be given to the adoption of a realistic compensation law for seamen, to take the place of the oddly assorted bundle of rights and remedies which they have today.

ARBITRATION

MARTIN DOMKE

THE YEAR 1953 saw a wider use of arbitration in both the commercial and labor-management fields. Many court decisions and articles in legal periodicals dealt with the effect of arbitration agreements, the challenge of awards and the function of the judiciary in the arbitration process.¹ Decisions of state and federal courts often have the value of guideposts, to improve arbitration practice and remedy deficiencies in arbitration proceedings which sometimes prevail also in institutional arbitration. The greater interest in arbitration appears also from a survey of the United States Department of Labor,² whereby its Bureau of Labor Statistics found, in a study of 1,442 collective bargaining agreements in effect during 1952, "that 89 per cent of the contracts, covering workers in twenty-nine broad industry categories, contained provisions relating to the arbitration of grievances."

Conferences on arbitration in labor-management relations were held at various universities, among them New York University,³ University of Pennsylvania,⁴ Temple,⁵ Notre Dame,⁶ State University

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¹ Cox, *Legal Aspects of Labor Arbitration* in New England, 8 *Arb. J.* 5 (1953), and *The Place of Law in Labor Arbitration*, 34 *Chi. Bar. Rec.* 205 (1953); Gotshal, *The Lawyer's Function in Arbitration*, 8 *Arb. J.* 23 (1953); Gross, *Judicial Control of Arbitrators' Jurisdiction* in New York, 38 *Cornell L.Q.* 391 (1953); Hofstadter, *Labor Arbitration in New York—With a Suggestion for the Establishment of Labor Courts*, 130 *N.Y.L.J.* 472, col. 1 (Sept. 18, 1953); King and Sears, *The Ethical Aspects of Compromise, Settlement and Arbitration*, 25 *Rocky Mt. L. Rev.* 454 (1953); Mayer, *Arbitration and the Judicial Sword of Damocles*, 4 *Lab. L.J.* 723 (1953); Mosk, *The Lawyer and Commercial Arbitration: The Modern Law*, 39 *A.B.A.J.* 193 (1953); Oldfather, *Compulsory Arbitration and Due Process*, 1 *Kan. L. Rev.* 279 (1953); Schoengold, *Arbitration: Its Snares and Delusions*, 19 *Brooklyn L. Rev.* 199 (1953); Sturges, *Arbitration under the Arbitration Statutes of Texas*, 31 *Texas L. Rev.* 833 (1953); Note, *Judicial Innovations in the New York Arbitration Law*, 21 *U. of Chi. L. Rev.* 148 (1953), reprinted in 130 *N.Y.L.J.* 1482, col. 1, 1500, col. 1 (Dec. 17, 18, 1953).

² *Labor-Management Contract Provisions 1952*, Bull. No. 1142 at 10 (May 1953).

³ N.Y.U. Sixth Annual Conference on Labor (1953). There were lectures by Seitz, *Enforcement of Labor Agreements by Arbitration*; Roberts, *Precedent and Procedure in Arbitration Cases*; Rosenfarb, *The Courts and Arbitration*; Simkin, *The Arbitration of Technical Disputes*; Livingston, *The Selection and Status of Labor Arbitration*; and Gray, *The Arbitrator's Authority on Remedies*.

⁴ *Proceedings of the Conference of April 10, 1953: Less Government in Labor-Management Relations: An Achievable Goal?*, Wharton School of Finance and Commerce, University of Pennsylvania, p. 140.

⁵ *Addresses of the Conference* in 26 *Temp. L.Q.* 363 (1953), among them Gregory, *Injunctions, Seizure and Compulsory Arbitration*, 26 *id.* at 397.

⁶ *Proceedings of the Conference on Arbitration in Labor-Management Relations*, University of Notre Dame (1953), with an Introduction by Braden (p. 2).

of Iowa,⁷ and the University of Texas.⁸ A labor-arbitration series⁹ found a symposium review of not less than forty-four pages by outstanding arbitration experts.¹⁰ 1953 marked the appearance of the first general textbook on arbitration—civil, commercial and labor-management—by Dean Wesley A. Sturges of Yale Law School;¹¹ casebooks on labor law increasingly included arbitration in their material.¹²

Legislative interest was evidenced in the enactment of minor statutory amendments to the New York Arbitration Law,¹³ and in suggestions for a labor arbitration statute in Pennsylvania¹⁴ and a general arbitration law in Florida.¹⁵ Moreover, a new draft of an arbitration act was recommended by the American Arbitration Association,¹⁶ and the National Conference of Commissioners on Uniform State Laws is again considering the advisability of a Uniform Arbitration Act.¹⁷

Of great importance for the development of international trade arbitration to which Americans are parties, is the inclusion of provisions for the reciprocal enforcement of arbitration agreements and arbitral awards in the new Treaties of Friendship, Commerce and Navigation with Denmark, Italy, Greece, Israel and Japan, to which

⁷ In the Proceedings of the Conference will be published an address by Braden, The Role of Arbitration in Labor-Management Relations, and those by White and by Fillon, Federal Mediation and Conciliation as a Preliminary to Arbitration.

⁸ Addresses at the Conference of October 30, 1953, appear in 8 Arb. J. No. 4 (1953).

⁹ Nine monographs edited by George W. Taylor, University of Pennsylvania Press (1952).

¹⁰ With an introduction by Davis, 5 Stan. L. Rev. 846 (1953); see also the review by Gregory, 39 Va. L. Rev. 278 (1953).

¹¹ Cases on Arbitration Law (1953).

¹² Forkosch, A Treatise on Labor Law §§ 297-304 (1953); Smith, Labor Law: Cases and Materials c. 10 (2d ed. 1953).

¹³ N.Y. Laws 1953, c. 556 (notice of hearing, Civ. Prac. Act § 1454[2]), c. 557 (notice of motion to stay arbitration proceedings, Civ. Prac. Act § 1458[2]), c. 558 (time for demand of jury trial, Civ. Prac. Act § 1458[2]), c. 570 (time for motion to confirm award, Civ. Prac. Act § 1461). Among the subjects under consideration by the Judicial Council of the State of New York is the use of arbitrators for negligence actions in the supreme court within the City of New York. 19 N.Y. Jud. Council Rep. 12 (1953).

¹⁴ Syme, The Essentials of a Labor Arbitration Law, 39 A.B.A.J. 832 (1953); Note, Enforceability of Collective Bargaining Agreements Under Pennsylvania Law, 26 Temp. L.Q. 425 (1953), and Elliott, Remarks on Legal Education, 6 J. Legal Educ. 158, 165 (1953).

¹⁵ Stern and Troetschel, The Role of Modern Arbitration in the Progressive Development of Florida Law, 7 Miami L.Q. 205 (1953); Yonge, Arbitration of an Ordinary Civil Claim in Florida, 6 U. of Fla. L. Rev. 157 (1953).

¹⁶ 7 Arb. J. 201 (1952); see also Sturges, Some General Standards for a State Arbitration Statute, 7 id. at 194.

¹⁷ Special Sub-Committee on a Uniform Arbitration Act, Handbook of the National Conference 20 (1952).

the United States Senate gave its consent and advice for ratification on July 21, 1953.¹⁸

Arbitration Agreements.—Controversies on the existence of a binding arbitration agreement do not subside in commercial arbitration. The question still does not seem to be finally settled how far arbitration clauses in unsigned order forms,¹⁹ or a mere reference to rules of an agency administering arbitration,²⁰ are binding upon the parties, especially when the merchandise has been retained. Thus, the incorporation of the Standard Cotton Textile Sales Note as part of the agreement,²¹ and a fine-print provision referring to Cotton Yarn Rules,²² were considered as binding the parties to submit to arbitration under the rules of the General Arbitration Council of the Textile Industry.

In labor-management arbitration, withdrawal from an employers' association did not end the binding effect of a collective bargaining agreement with the union which provided for arbitration, since "his obligation in joining the Association ran to the end of the term of the labor agreement by which he agreed to be bound."²³ A triable issue, however, was presented when a member of a manufacturers' association who participated in an arbitration thought that the claims of the union were being made under an earlier contract and not under a subsequent agreement of the association with the union.²⁴ On the other hand, the binding force of a collective bargaining agreement upon the members of the union generally prevents employees from maintaining any claim individually, either in court action²⁵ or in

¹⁸ See Commercial Treaties, Hearings before the Subcommittee of the Committee on Foreign Relations, United States Senate, 83d Cong., 1st Sess. (1953).

¹⁹ *Gaynor Junior Dresses, Inc. v. James Talcott, Inc.*, 129 N.Y.L.J. 329, col. 3 (Sup. Ct. Jan. 29, 1953).

²⁰ *Bristol Paper Products, Inc. v. Ameximpo, Inc.*, 305 N.Y. 569 (1953), affirming 280 App. Div. 930, 116 N.Y.S.2d 501 (1st Dep't 1952), whereby "the request for a confirmation was not a condition but may be looked upon as for record purposes only." See also *Franklin Fine Foods v. Rosero, Inc.*, 129 N.Y.L.J. 1817, col. 3 (Sup. Ct. May 29, 1953) (Ecuadorian import license, referring to the arbitration clause of the Inter-American Commercial Arbitration Commission).

²¹ *Level Export Corp. v. Wolz, Aiken & Co.*, 305 N.Y. 82, 111 N.E.2d 218 (1953), reversing 280 App. Div. 211, 112 N.Y.S.2d 549 (1st Dep't 1952); see Note, 21 U. of Chi. L. Rev. 153 (1953).

²² *Application of Riverdale Fabrics Corp.*, 281 App. Div. 983, 121 N.Y.S.2d 261 (2d Dep't 1953). For a discussion of recent cases, see *Helen Whiting, Inc. v. Trojan Textile Corp.*, 130 N.Y.L.J. 1400, col. 8 (Sup. Ct. Dec. 10, 1953).

²³ *Joint Board of Waist & Dressmakers' Union of Philadelphia v. Rosinsky*, 20 Lab. Arb. 778 (Pa. Super. Ct. 1953).

²⁴ *Matter of Feinberg*, 130 N.Y.L.J. 194, col. 8 (Sup. Ct. Aug. 5, 1953).

²⁵ *Curtis v. New York World-Telegram Corp.*, 282 App. Div. 183, 121 N.Y.S.2d 825 (1st Dep't 1953).

arbitration,²⁶ "while the recovery, if any, will be the property of the particular employee involved."²⁷

In some instances, the conclusion of an agreement containing an arbitration clause is not disputed but the validity and therefore the binding force of the arbitration clause may be challenged for reasons of public policy. This is the case with a margin agreement of a New York brokerage firm, where the arbitration clause was held unenforceable²⁸ as being against the public policy of Section 77(e) of the Securities Act of 1933.²⁹ Usury which might invalidate a contract and its arbitration clause presents a triable issue,³⁰ whereas the challenge of duress in obtaining a collective bargaining agreement containing an arbitration clause was not considered to set forth "evidentiary facts raising a substantial issue as to the making of the contract."³¹ Similarly, the alleged illegality of closed-shop provisions did not prevent arbitration proceedings and left the party "to proceedings before the National Labor Relations Board, the tribunal which concededly has exclusive jurisdiction of the question of unfair labor practices."³² A contract for the sale of tomato paste, claimed to be invalid after the merchandise was condemned by the federal authorities and its destruction ordered, was held enforceable as to its arbitration clause, the court stating that "it was not the intent of the parties to do an illegal act nor did the contract call for one. The situation presents a question of law, possibly simple of solution, as to where the risk of loss is on such a sale. The contract provides for the resolution of that question by arbitration."³³

These decisions confirm an established principle of arbitration law that all events occurring after the conclusion of an arbitration agreement are for consideration by the arbitrators, such as the termination of a collective bargaining agreement,³⁴ the cancellation

²⁶ Matter of American Radio Ass'n, 128 N.Y.L.J. 1561, col. 6 (Sup. Ct. Dec. 22, 1952).

²⁷ Ibid. As to the third party's right to compel arbitration, see *Simadiris v. Hotel Waldorf Astoria Corp. and New York Hotel Trades Council*, 281 App. Div. 665, 117 N.Y.S.2d 350 (1st Dep't 1952).

²⁸ *Wilco v. Swan*, 74 Sup. Ct. 182 (1953), reversing 201 F.2d 439 (2d Cir. 1953), 53 Col. L. Rev. 735, 41 Geo. L.J. 565, 66 Harv. L. Rev. 1326, 39 Va. L. Rev. 685. See Note, 62 Yale L.J. 985 (1953).

²⁹ 48 Stat. 74 (1933), 15 U.S.C. §§ 77(a)-77(aa) (1946).

³⁰ *Schoeffer v. Lowell Adams*, 305 N.Y. 565, 111 N.E.2d 440 (1953).

³¹ *Local 853, Retail Furniture & Floor Covering Employees Union v. Zimmermann*, 281 App. Div. 681, 117 N.Y.S.2d 88 (2d Dep't 1952).

³² *Pacific Fire Rating Bureau v. Bookbinders' and Bindery Women's Union*, 115 Cal. App.2d 111, 115, 251 P.2d 694, 697 (1952); see also *Stowe v. Aircooled Motors, Inc.*, 204 Misc. 228 (N.Y. Sup. Ct. 1953), and *Singer*, Section 10(a) [of the Labor-Management Relations Act of 1947] and Arbitrators' Awards, 4 Lab. L.J. 727 (1953).

³³ *In re L. N. White & Co.*, 129 N.Y.L.J. 1622, col. 7 (Sup. Ct. May 14, 1953).

³⁴ *In re Commercial Telegraphers Union*, 123 N.Y.S.2d 259 (Sup. Ct. 1953).

of a written employment contract containing an arbitration clause by a later oral agreement,³⁵ the termination by timely notice to the seller of an agreement between a French and a Venezuelan corporation for the sale of oil,³⁶ or the alleged rescission and cancellation of an agreement of a California party which did not participate in a New York arbitration, which question "should have been raised before the arbitrators."³⁷

The Arbitrable Issue.—Arbitration can be had only of those controversies which were contemplated by the parties at the time they inserted an arbitration clause into their agreement. Thus, an explosion at South Amboy, New Jersey, of antitank mines which had been bought by the Government of Pakistan gave rise to a claim by the insurance company, as subrogee, for damages which it demanded under an arbitration clause in the contract between the Pakistan Government and the Ohio munitions manufacturer. This arbitration was resisted inasmuch as the parties never contemplated the settlement of such issue by arbitration. It was held,³⁸ however, that the matter did not "sound in tort" but was grounded solely on breach of a written contract. An arbitration statute such as Section 1281 of the California Code of Civil Procedure which applies to disputes "arising out of a contract" was considered to include also tort liabilities.³⁹ "There is no requirement that the cause of action arising out of a contractual dispute must be itself contractual. At most, the requirement is that the dispute must arise out of a contract."⁴⁰ On the other hand, the liability of an employer for an accident to an employee was considered not an issue arising out of the agreement (within the meaning of Section 11-604 of the Oregon Compiled Laws Annotated) and therefore a court action for damages as the result of the injury was not stayed, in spite of the arbitration agreement.⁴¹

In a case where the bylaws of a property-owners' association provided for arbitration of controversies within the corporation, the question whether subversive activities of its officers were arbitrable

³⁵ *In re Smoler Bros., Inc.*, 128 N.Y.L.J. 1360, col. 4 (Sup. Ct. Dec. 3, 1952). As to the effect of oral agreements, cf. *Arranbee Doll Co. v. Model Plastic Corp.*, 282 App. Div. 660, 122 N.Y.S.2d 137 (1st Dep't 1953).

³⁶ *In re Compagnie Francaise des Petroles*, 130 N.Y.L.J. 595, col. 4 (Sup. Ct. Sept. 30, 1953). See also 305 N.Y. 588, 111 N.E.2d 645 (1953).

³⁷ *Matter of Weiner*, 129 N.Y.L.J. 2119, col. 6 (Sup. Ct. June 25, 1953).

³⁸ *Kilgore Mfg. Co. v. New Hampshire Fire Ins. Co.*, 280 App. Div. 332, 113 N.Y.S.2d 554 (1st Dep't 1952), *aff'd mem.*, 305 N.Y. 815, 113 N.E.2d 558 (1953).

³⁹ *Crofoot v. Blair Holdings Corp.*, 260 P.2d 156, 170 (Cal. App. 1953).

⁴⁰ *Ibid.*

⁴¹ *Shepard & Morse Lumber Co. v. Collins*, 256 P.2d 500 (Ore. 1953).

was considered a triable issue as to the intent of the parties.⁴² On the other hand, the assignment of teachers by a high-school principal to extracurricular activities and the failure to compensate them for their services were not considered arbitrable issues, under a grievance agreement with a teachers' association, since a policy matter was involved for which the Board of Education had legal responsibility.⁴³

Arbitration can be had only of bona fide disputes. Overtime charges in connection with newsreels were disputed under a contract which specifically provided that in no event would such charges be made. It was held⁴⁴ that "the question of whether a bona fide dispute exists between the parties is a question of law for the court to decide. . . . the contract is clear and unambiguous; the issue is one of law, and there is nothing to arbitrate."⁴⁵

Often controversies arise whether the parties to an undisputed arbitration agreement did or did not contemplate the settlement by arbitration of a specific question, such as the dissolution of a closed corporation⁴⁶ or of a partnership,⁴⁷ the diversion of funds of a partnership,⁴⁸ a restrictive covenant to continue manufacturing,⁴⁹ the hiring of a vessel for a cargo of steel plates to be carried from Japan to Canada,⁵⁰ and the discontinuance in good faith of the business of a partnership, a party to a collective bargaining agreement with a union.⁵¹

In the construction field, repair of damages from leaks following a rainstorm was not considered exempt from arbitration, as not involving extra work within the meaning of Article 40 of the General

⁴² Posner v. Mandel, 129 N.Y.L.J. 1578, col. 5 (Sup. Ct. May 11, 1953).

⁴³ Matter of High School Teachers' Ass'n (Tottenville High School; Board of Education of the City of New York), 130 N.Y.L.J. 444, col. 5 (Sup. Ct. Sept. 16, 1953).

⁴⁴ Warner News, Inc. v. Pathé Laboratories, Inc., 129 N.Y.L.J. 89, col. 2 (Sup. Ct. Jan. 9, 1953). See Note, Matters Arbitrable under Arbitration Provisions of Collective Labor Contract, 24 A.L.R.2d 754 (1953). See also the comments on Alpert v. Admiralty Knitwear Co., 304 N.Y. 1, 105 N.E.2d 561 (1952), 1952 Annual Surv. of Am. L. 749 n.30, 28 N.Y.U.L. Rev. 839 n.30 (1953); 17 Albany L. Rev. 210 (1953); 21 U. of Chi. L. Rev. 148 (1953).

⁴⁵ Warner News, Inc. v. Pathé Laboratories, Inc., supra note 44.

⁴⁶ In re City Commercial Corp., 129 N.Y.L.J. 637, col. 8 (Sup. Ct. Feb. 26, 1953); Application of Hega Knitting Mills, Inc., 124 N.Y.S.2d 115 (Sup. Ct. 1953). On the effect of a dissolution of an Illinois corporation on a New York arbitration, see *Republique Francaise v. Cellosilk Mfg. Co.*, 124 N.Y.S.2d 93 (Sup. Ct. 1953).

⁴⁷ Andrews v. Andrews, 130 N.Y.L.J. 87, col. 3 (Sup. Ct. July 15, 1953).

⁴⁸ Gutwirth v. Carewell Trading Co., 129 N.Y.L.J. 1623, col. 2 (Sup. Ct. May 14, 1953).

⁴⁹ Application of Fay, 281 App. Div. 657, 117 N.Y.S.2d 855 (1st Dep't 1952).

⁵⁰ Associated Metals & Minerals Corp. v. Societa Anonima Importazione Carboni E Navigazione Savona, 111 F. Supp. 77 (S.D.N.Y. 1952).

⁵¹ Shapiro v. Rosenblatt, 282 App. Div. 245, 122 N.Y.S.2d 743 (1st Dep't 1953).

Conditions of Contract of the American Institute of Architects,⁵² but rather damages sustained by the contractor due to allegedly imperfect construction on the subcontractor's part and therefore arbitrable.⁵³ Similarly, arbitration was upheld for claims for extras inasmuch as the architect pursuant to Article 39 of the (aforementioned) General Conditions had issued a certificate that no payment should be made to the contractor because of the latter's alleged breach of contract.⁵⁴

An interesting question, at present before the New York Court of Appeals,⁵⁵ concerns the interpretation of an insurance policy for a subcontractor's liability, namely, whether arbitration proceedings may be considered a "suit" and an arbitral award an "obligation imposed by law" within the meaning of both terms of the policy.⁵⁶

Discharge of employees for accepting employment with a competing company during their off-hours gave rise to the question whether the collective bargaining agreement placed restrictions on the inherent right of the employer to discharge. Said the New York Court of Appeals:⁵⁷ "The failure to allude specifically to every possible area of dispute should not result in making an arbitration clause unworkable where the parties have said that it was their intention to include 'any dispute . . . with reference to any matter not provided for in this Contract.'" Among further issues considered arbitrable were a dispute of two groups of pilots as to respective seniority rights under a merger of two air carriers,⁵⁸ salary rates of teachers which were in dispute between a voluntary teachers' association and the Board of Education in Norwalk, Connecticut,⁵⁹ a disagreement over the manner of transfer of listings,⁶⁰ a dispute on the employer's right to shift checkers of deepwater cargoes,⁶¹ the interpretation of the term "on probation" in a stipulation for reinstatement of an

⁵² *Gotham Construction Corp. v. Hycourt Realty Corp.*, 129 N.Y.L.J. 495, col. 7 (Sup. Ct. Feb. 13, 1953).

⁵³ *P. J. Carlin Construction Co. v. Bartley Bros. Construction Corp.*, 305 N.Y. 784, 113 N.E.2d 300 (1953).

⁵⁴ *Elora Realty, Inc. v. William Savage, Inc.*, 305 N.Y. 842, 114 N.E.2d 39 (1953).

⁵⁵ *Madawick Contracting Co. v. Travelers Ins. Co.*, 281 App. Div. 754, 118 N.Y.S.2d 115 (2d Dep't 1953); Note, 27 St. John's L. Rev. 350 (1953).

⁵⁶ Amicus curiae petitions were filed with the New York Court of Appeals by the American Arbitration Association, American Institute of Architects, General Arbitration Council of the Textile Industry, New York Chamber of Commerce and New York Stock Exchange.

⁵⁷ *Bohlinger v. National Cash Register Co.*, 305 N.Y. 539, 542, 114 N.E.2d 31, 32 (1953). See Justin, *Arbitrator's Authority in Disciplinary Cases*, 8 Arb. J. 63 (1953).

⁵⁸ *O'Donnell v. Pan American World Airways*, 200 F.2d 929 (2d Cir. 1953).

⁵⁹ *Norwalk Teachers' Ass'n v. Board of Education of the City of Norwalk*, 138 Conn. 269 (1953).

⁶⁰ *Matter of Eisenstat*, 129 N.Y.L.J. 1371, col. 2 (Sup. Ct. April 24, 1953).

⁶¹ *In re Isthmian S.S. Co.*, 129 N.Y.L.J. 1246, col. 1 (Sup. Ct. April 13, 1953).

employee,⁶² severance pay for unjustly discharged employees,⁶³ the meaning of the term "production and maintenance employees,"⁶⁴ the payment of a percentage of weekly wages into a pension fund of the hotel industry,⁶⁵ and damages for the union's breach of a nonstrike pledge.⁶⁶

The Enforcement of Arbitration Agreements.—Controversies arising out of labor-management relations are generally considered to be excluded from any application of the Federal Arbitration Act.⁶⁷ Nevertheless, a specific performance of an arbitration clause under a collective bargaining agreement may be directed in application of Section 301(a) of the Labor Management Relations Act,⁶⁸ which provides for suits in a federal district court for violation of collective bargaining agreements in any industry affecting commerce as defined in the Act. Thus it was held⁶⁹ that under Section 301 specific performance of an arbitration clause for disputed separation pay may be directed.⁷⁰

The exhaustion of steps in the grievance procedure is always a prerequisite to arbitration. Thus, a court proceeding for damages

⁶² Application of Fay, 281 App. Div. 907, 120 N.Y.S.2d 130 (2d Dep't 1953).

⁶³ Buffalo Courier-Express, Inc. v. Dyviniak, 124 N.Y.S.2d 249 (Sup. Ct. 1953).

⁶⁴ Rugen v. North American Phillips Co., 130 N.Y.L.J. 194, col. 8 (Sup. Ct. Aug. 5, 1953), aff'd, 282 App. Div. 931, 125 N.Y.S.2d 645 (1st Dep't 1953).

⁶⁵ Application of Alamac Restaurant, Inc., 203 Misc. 463, 119 N.Y.S.2d 498 (Sup. Ct.), aff'd mem., 281 App. Div. 1016, 121 N.Y.S.2d 272 (1st Dep't 1953).

⁶⁶ Regent Quality Furniture, Inc. v. Korman, 129 N.Y.L.J. 2142, col. 7 (June 29, 1953), modified, 125 N.Y.S.2d 843 (App. Div., 1st Dep't 1953). Contra: Ludlow Manufacturing & Sales Co. v. Textile Workers Union of America, 108 F. Supp. 45 (D. Del. 1952), and Markel Electric Products, Inc. v. United Electrical, Radio & Machine Workers of America, 202 F.2d 435 (2d Cir. 1953). See notes 109 and 110 *infra*.

⁶⁷ See 65 Harv. L. Rev. 1239 (1952), and for a recent discussion of the decisional law, Tenney Engineering, Inc. v. United Electrical Radio & Machine Workers of America, 207 F.2d 450 (3rd Cir. 1953) (exclusion clause of § 1 of Federal Arbitration Act non-applicable to employees engaged in manufacturing goods and not "in foreign or interstate commerce").

⁶⁸ 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (Supp. 1952).

⁶⁹ Textile Workers Union v. American Thread Co., 113 F. Supp. 137 (D. Mass. 1953). See Katz and Jaffe, Enforcing Labor Arbitration Clauses by Section 301, Taft-Hartley Act, 8 Arb. J. 80 (1953), and Note, 53 Col. L. Rev. 1019 (1953); Recent Case, 67 Harv. L. Rev. 181 (1953).

⁷⁰ The court did not decide the question whether § 301(a) is solely jurisdictional or creative of federal rights—see Shirley-Herman Co. v. International Hod-Carriers Union, 182 F.2d 806, 17 A.L.R.2d 609 (2d Cir. 1950) and the recent decision in *Waialua Agr. Co. v. United Sugar Workers*, 114 F. Supp. 243 (D. Hawaii 1953)—and further did not decide the question whether federal courts acting under § 301 are to apply federal or local law to determine the rights of the parties since "[u]nder either so-called federal common law or under Massachusetts law this contract to arbitrate is valid and creates rights in the parties." *Textile Workers Union v. American Thread Co.*, 113 F. Supp. 137, 141 (D. Mass. 1953). As to the enforcement of awards under § 301(a) of the Taft-Hartley Act, see note 130 *infra*.

as a result of a strike would not be stayed under a broad arbitration clause of the collective bargaining agreement, since the latter granted the right to demand arbitration only to the party initiating a grievance which the union had not done in this case.⁷¹

The observance of time limits for demanding arbitration is up to the arbitrators, and not to the courts,⁷² e.g., under a construction contract which provided for a ten-day time limit for demanding arbitration after the failure of the owner to decide upon a claim within thirty days after it had been filed.⁷³ A court action after the time limit for demanding arbitration (within five days after tender of brewer's rice) had expired was dismissed,⁷⁴ since otherwise "the result would be a return to the situation obtaining when agreements to arbitrate were revocable at the will of the party thereto."⁷⁵ Though the statute of limitations does not generally apply to arbitration,⁷⁶ its effect on asserted obligations "will be determined by the arbitrators."⁷⁷

Summary procedure for the enforcement of arbitration agreements may, of course, be had only when the statute expressly so provides.⁷⁸ Thus, in *Arkansas an Oklahoma contractor's action against a Kentucky benevolent association for a declaratory judgment that the former was entitled to arbitration of a claim for additional compensation for excavation work in Little Rock, Arkansas*, was not allowed.⁷⁹ The contract was considered a local building contract which did not evidence any transaction involving interstate commerce within the

⁷¹ *United Electrical, Radio & Machine Workers of America v. Oliver Corp.*, 205 F.2d 376 (8th Cir. 1953).

⁷² See *Government of Indonesia v. The General San Martin*, 114 F. Supp. 289 (S.D.N.Y. 1953), where the time limit for the appointment of an arbitrator within three months of final discharge of cargo was considered not unreasonable.

⁷³ *Matter of Caristo Construction Corp.*, 129 N.Y.L.J. 1973, col. 1 (Sup. Ct. June 11, 1953).

⁷⁴ *River Brand Rice Mills, Inc. v. Latrobe Brewing Co.*, 305 N.Y. 36, 110 N.E.2d 545 (1953).

⁷⁵ *Id.* at 41, 110 N.E.2d at 547. See Pollack, *Effect of Time Limitations on Arbitration Agreements*, 8 *Arb. J.* 40 (1953), and Note, *Time Limitations Under the Arbitration Law*, 28 *St. John's L. Rev.* 47 (1953).

⁷⁶ Cf. *Matter of American Radio Ass'n*, 128 N.Y.L.J. 1561, col. 6 (Sup. Ct. Dec. 22, 1952); *Matter of Hammerstein*, 130 N.Y.L.J. 740, col. 2 (Sup. Ct. Oct. 14, 1953) (six-year statute of limitations applies to an arbitration for accounting for a venture between play authors and producer).

⁷⁷ *Reconstruction Finance Corp. v. Harrisons & Crosfield, Ltd.*, 204 F.2d 366 (2d Cir.), cert. denied, 74 Sup. Ct. 69 (1953). Cf. *Unsinn v. Republique Francaise*, 281 App. Div. 738, 117 N.Y.S.2d 801 (1st Dep't 1953) (expiration of a warranty clause of twelve months to be determined by the arbitrators).

⁷⁸ See *Sherman, Specific Enforcement of Agreements to Arbitrate Labor Disputes in Wisconsin*, [1953] *Wis. L. Rev.* 739.

⁷⁹ *W. R. Grimshaw Co. v. Nazareth Literary & Benevolent Institution*, 113 F. Supp. 564 (D. Ark. 1953).

meaning of Section 4 of the Federal Arbitration Act. Similarly, in an Oklahoma arbitration of a partnership dispute, a partner had refused to appoint an arbitrator and thereby revoked the arbitration agreement. It was held⁸⁰ that when the arbitration statute does not provide for enforceability of future arbitration clauses, "the agreement may be revoked at any time before the making of the award." In the same way, the Supreme Court of Florida⁸¹ held such an agreement (providing for arbitration of future disputes on the partition of apartment house property) invalid "as constituting an attempt to oust the legally constituted courts of their jurisdiction."

An important decision on the disputed question of the effect of arbitration clauses in government contracts was rendered by the Court of Claims.⁸² The Commodity Credit Corporation, acting on behalf of the Defense Plant Corporation, both agencies of the United States Government, provided for arbitration in a contract for the construction of hemp mills in Minnesota, whereby in case of failure of the two party-appointed arbitrators to select a third, the selection would be made by the senior judge of the federal district court. In an action for damages allegedly resulting from delays on the part of the Government, the construction firm denied that the arbitration clause barred the court action. In refuting that allegation, the Court of Claims referred to recent Supreme Court decisions⁸³ which approved Article 15 of the standard form of government contract, whereby the contracting officer should make the decision of a dispute subject to the contractor's right to appeal to the head of the department. Said the Court of Claims: "That is a sort of arbitration, albeit by agents of one party to the contract. Yet it violates as completely as arbitration by third persons, as provided for in the instant contract, would violate, any doctrine that Congress has consented to have decisions made against the government only in the Court of Claims."⁸⁴

The right to arbitration is, generally, lost by participation in court actions, either in instituting such suit or in defending it without "seasonably" pleading the arbitration provision.⁸⁵ Such waiver of

⁸⁰ *Wilson v. Gregg*, 255 P.2d 517, 520 (Okla. 1952).

⁸¹ *Fenster v. Makovsky*, 67 So.2d 427 (Fla. 1953).

⁸² *Grant Construction Co. v. United States*, 109 F. Supp. 245 (Ct. Cl. 1953); Note, 53 Col. L. Rev. 879 (1953).

⁸³ *United States v. Moorman*, 338 U.S. 457 (1950), and *Wunderlich v. United States*, 342 U.S. 98 (1951); see Braucher, *Arbitration under Government Contracts*, 17 Law & Contemp. Prob. 473, 487 (1952); Mulligan, *The Disputes Clause of the Government Construction Contract: Its Misconstruction*, 27 Notre Dame Law. 167 (1952); Schultz, *Proposed Changes in Government Contract Disputes Settlement: The Legislative Battle over the Wunderlich Case*, 67 Harv. L. Rev. 217 (1953).

⁸⁴ *Grant Construction Co. v. United States*, 109 F. Supp. 245, 247 (Ct. Cl. 1953).

⁸⁵ *Burton v. Klaw*, 129 N.Y.L.J. 329, col. 6 (Sup. Ct. Jan. 29, 1953); *National*

arbitration is not always to be assumed, *e.g.*, when a party brought suit in a Dutch court to preserve its rights in an undertaking given by the charterer to obtain the release of a cargo.⁸⁰ In spite of an arbitration clause in a time charter executed in New York between a Colombian corporation and a Danish partnership, the federal district court retained jurisdiction of a libel suit to recover the value of a cargo of bananas, since "the statute contemplates that although the parties agreed to arbitrate, the traditional admiralty procedure, with its concomitant security, should be available to the aggrieved party."⁸⁷

Arbitrations to be held in a foreign country are also covered by Section 5 of the Federal Arbitration Act⁸⁸ whereby the court may direct the party to proceed with the arbitration. Such arbitration of a claim for damages to a cargo may not be resisted on the alleged vague and nebulous character of an arbitration clause of a charter party entered into in London between a Louisiana company and an Italian corporation, and providing for "arbitration to be settled in London." In staying the court action until arbitration was had, the court⁸⁹ held that the arbitration clause agreed upon in London "has to be interpreted by British law rather than by the law of this country." If the parties did not agree upon a place of arbitration, reference to arbitration rules which authorize an administrative agency to determine the place was recognized as binding the parties to abide by such choice.⁹⁰

The disputed issue as to whether an examination before trial can be had by parties to an arbitration, a special proceedings pursuant to Section 1459 of the New York Civil Practice Act, came up in a case where the court said⁹¹ that in its opinion such examination "as to whether a contract providing for arbitration was made is proper although an examination would be improper as to matters which are to be decided by arbitrators rather than by the court."

The Arbitrator.—Disqualification of an arbitrator remains one of the issues which courts are often called upon to determine. An

Container Corp. v. Costello, 129 N.Y.L.J. 345, col. 6 (Sup. Ct. Jan. 30, 1953). On the other hand, by submission to arbitration of a construction dispute pending in court, with the latter's approval, the court action was definitely discontinued. Pick Industries, Inc. v. Gebhard-Berghammer, Inc., 262 Wis. 498, 56 N.W.2d 97 (1952).

⁸⁰ In re Cia Naviera Veragua, S.A., 129 N.Y.L.J. 381, col. 1 (Sup. Ct. Feb. 3, 1953).

⁸⁷ Industrial Y Frutera Colombiana, S.A., v. The Brisk, 195 F.2d 1015 (5th Cir. 1952).

⁸⁸ Uniao De Transportadores Para Importacao E Comercio, Ltda. v. Companhia de Navegacao Carregadores Acoreanos, 84 F. Supp. 582 (E.D.N.Y. 1949).

⁸⁹ Fox v. The Guiseppe Mazzini, 110 F. Supp. 212 (E.D.N.Y. 1953).

⁹⁰ In re Maple Yarn Mills, Inc., 129 N.Y.L.J. 1589, col. 6 (Sup. Ct. May 12, 1953).

⁹¹ Brookside Mills, Inc. v. Charles Bernstein & Son, 130 N.Y.L.J. 145, col. 1 (Sup. Ct. July 27, 1953).

arbitration under the rules of the New York Produce Exchange was challenged by an Argentine corporation for the reason that the president of the other party was a member of the board of governors of the exchange which appoints the members of the arbitration board. Since his membership was not concealed, letters having openly proclaimed such membership, and earlier contracts having had a provision for arbitration by the same board, the claim of disqualification was denied,⁹² the court stating: "The case would be different if upon timely inquiry there had been a false statement as to non-membership in the exchange." Former business dealings of the arbitrator with a party to the arbitration do not always constitute reason for disqualification,⁹³ nor does mere personal friendship with one of the parties,⁹⁴ nor does the fact that a party's attorney is counsel of the association (National Knitted Outer Wear Association in the City of New York) under whose rules a dispute of an employment agreement was to be arbitrated.⁹⁵ On the other hand, a party-appointed arbitrator's membership in a law firm occasionally representing that party is sufficient reason for disqualification;⁹⁶ such is not the case when, over a party's objection, the court's opinion setting aside a previous award is read during an arbitration proceeding.⁹⁷ Vacancies are usually filled by the agency administering the arbitration under the respective rules, such as those of the National Federation of Textiles,⁹⁸ or in case two arbitrators fail to select a third, the court will appoint him, since such failure should not be allowed to thwart the arbitration.⁹⁹

Court actions resulted from clauses referring to arbitration in indefinite terms, such as a 1950 contract of New York corporations for the sale of aluminum sheets to be shipped from England, which provided for "New York Friendly Arbitration (each party appointing one arbitrator)." Since the two arbitrators did not reach a decision,

⁹² *L. N. Jackson & Co. v. Compania Gasoliba S.A.*, 282 App. Div. 125, 121 N.Y.S.2d 624 (1st Dep't), motion to dismiss appeal withdrawn, 306 N.Y. 596, 115 N.E.2d 826 (1953).

⁹³ *Matter of Raycrest Mills, Inc.*, 129 N.Y.L.J. 1607, col. 1 (Sup. Ct. May 13, 1953).

⁹⁴ *Kentucky River Mills v. Jackson*, 206 F.2d 111 (6th Cir.), cert. denied, 74 Sup. Ct. 144 (1953).

⁹⁵ *Swiller v. Peter Freund Knitting Mills, Inc.*, 129 N.Y.L.J. 1607, col. 3 (Sup. Ct. May 13, 1953).

⁹⁶ *Stathatos v. Arnold Bernstein S.S. Corp.*, 202 F.2d 525 (2d Cir. 1953).

⁹⁷ *A. M. Perlman, Inc. v. Raycrest Mills, Inc.*, 305 N.Y. 803, 113 N.E.2d 554 (1953). See *Popkin, Conduct of Arbitrators*, 8 Arb. J. 37 (1953).

⁹⁸ *Knickerbocker Textile Corp. v. Donath*, 282 App. Div. 680, 122 N.Y.S.2d 807 (1st Dep't 1953). See also *In re Tanbro Fabrics Corp.*, 129 N.Y.L.J. 153, col. 8 (Sup. Ct. Jan. 15, 1953).

⁹⁹ *L. & R. Hewett Construction Corp. v. Ausnit*, 129 N.Y.L.J. 843, col. 6 (Sup. Ct. March 13, 1953), rev'd, 281 App. Div. 1011, 121 N.Y.S.2d 263 (1st Dep't 1953); *In re Konvitz*, 129 N.Y.L.J. 1639, col. 8 (Sup. Ct. May 15, 1953); *In re Schneider Silk Mills, Inc.*, 130 N.Y.L.J. 402, col. 6 (Sup. Ct. Sept. 11, 1953).

court appointment of a third or of a single arbitrator was sought, obviously in view of Section 8(1) of the British Arbitration Act of 1950 whereby generally a reference to two arbitrators "is deemed to include a provision that the two arbitrators shall appoint an umpire immediately thus appointed."¹⁰⁰ The court denied the motion in stating: "The meaning of the words 'friendly arbitration' under English law is not material here in view of the fact that the contracts between the parties were made in this state between residents of this state and are governed by the laws of this state."¹⁰¹

Though strict rules of evidence do not prevail in arbitration proceedings,¹⁰² the arbitrator has to refrain from any independent investigations without express authorization of the parties, even though a posthearing investigation might be made with the best of intentions.¹⁰³ On the other hand, the determination of the arbitrators not to inspect the premises is a matter for their discretion and not reviewable by the court.¹⁰⁴

Awards.—The arbitrator's reasoned opinion, a usual feature in labor-management arbitration, does not form part of the award when he filed the opinion as a separate explanatory document.¹⁰⁵ But any contradiction of the award with his findings will not lead to the vacating of the award as an imperfect execution of the powers conferred upon the arbitrator, as when he found the discharge of a driver not proper and then made the employee to be reinstated forfeit two weeks' wages.¹⁰⁶ The court found that the arbitrator in his interpretation of the contract could deal with the issue of reinstatement and its terms and thus could attach to the reinstatement a condition (namely, the penalty of loss of two weeks' pay). Similarly, the arbitrator's right to reduce the penalty of discharge for insubordination to the loss of a week's wages was sustained.¹⁰⁷ So was the arbitrator's commutation of the discharge of the union's grievance-

¹⁰⁰ See Russell, *Law of Arbitration* 179 (White ed. 1952).

¹⁰¹ *Kenway Metals Corp. v. Albert M. Goldstein, Inc.*, 130 N.Y.L.J. 258, col. 5 (Sup. Ct. Aug. 18, 1953).

¹⁰² *Robinson v. Union-Fern, Inc.*, 129 N.Y.L.J. 40, col. 4 (Sup. Ct. Jan. 6, 1953); see Singer, *Labor Arbitration: Basis for the Evidence Rule*, 4 Lab. L.J. 9 (1953); Unterberger, *Technicians as Arbitrators of Wage Disputes*, 4 id. at 433.

¹⁰³ *Astra Trading Corp. v. Samuel Barotz & Co.*, 130 N.Y.L.J. 59, col. 2 (N.Y. City Ct. July 10, 1953).

¹⁰⁴ *In re Appel*, 130 N.Y.L.J. 43, col. 1 (Sup. Ct. July 8, 1953).

¹⁰⁵ *Textile Workers Union v. Cheney Brothers*, 20 Lab. Arb. 293 (Conn. Super. Ct. 1953). Cf. Rubin & Ponder, *The Ostrich and the Arbitrator: The Use of Precedent in Arbitration of Labor-Management Disputes*, 13 La. L. Rev. 208 (1953).

¹⁰⁶ *Samuel Adler, Inc. v. Local 584, Int'l Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers*, 282 App. Div. 142, 122 N.Y.S.2d 8 (1st Dep't 1953).

¹⁰⁷ *Niles-Bement-Pond Co. v. Amalgamated Local 405, United Auto Workers*, 97 A.2d 898 (Conn. 1953).

committee chairman to a three-week suspension.¹⁰⁸ The decision that punitive damages may not be granted against a union for breach of a no-strike clause, as being against public policy and not enforceable by the judicial power,¹⁰⁹ has again found further comment, and thus become the most annotated arbitration decision of recent years.¹¹⁰ When, however, a collective bargaining agreement limits the arbitrator's determination expressly to the terms and provisions of the agreement, he has no authority to examine and pass upon the qualifications and rights to promotion claimed by junior employees against senior employees, and an award was therefore vacated.¹¹¹

The award has to be definite and has to dispose of the matters submitted to the arbitrator's determination. An award which provided for the delivery and payment for "the yarn in question" gave cause for a second arbitration before the same arbitrators, as ordered by the court,¹¹² to determine the performance of the seller's obligation under the first award, when the quality of the yarn thereafter shipped was disputed. Similarly, it was doubtful whether the deductibility of expenses from the proceeds of a sale of liquids was determined by the award, which was remitted to the same arbitrator for clarification.¹¹³ An award must also comply with statutory requirements,¹¹⁴ whereby installments for the purchase of a retiring stockholder's shares by a corporation should be limited to years in which surplus was available.¹¹⁵ The award is, of course, limited to disputes expressly submitted to the arbitrators for determination.¹¹⁶ Those parts of the

¹⁰⁸ *Reading Tube Corp. v. Steel Workers Federation*, 20 Lab. Arb. 780 (Pa. Super. Ct. 1953).

¹⁰⁹ *Publishers' Ass'n v. Newspaper & Mail Deliverers' Union*, 280 App. Div. 500, 114 N.Y.S.2d 401 (1st Dep't 1952). Penal damages, however, as authorized under the rules of the American Spice Trade Association, were considered compensatory costs and thus not contrary to public policy. *East India Trading Co. v. Halari*, 305 N.Y. 866, 114 N.E.2d 213 (1953).

¹¹⁰ In addition to the Notes listed in 1952 Annual Surv. Am. L. 759 n.129, 28 N.Y.U.L. Rev. 849 n.129 (1953), see Recent Cases, 28 N.Y.U.L. Rev. 217 (1953), 22 Ford. L. Rev. 202 (1953), 27 St. John's L. Rev. 346 (1953).

¹¹¹ *International Brotherhood of Electrical Workers v. Mutual Tel. Co.*, 20 Lab. Arb. 524 (Hawaii 1953). On the reduction of seniority status by the arbitrator, see Shulman, Book Review, 5 Stan. L. Rev. 877 (1953).

¹¹² *Lafayette Worsted Spinning Co. v. Fashion Art Knitting Mills*, 281 App. Div. 259, 119 N.Y.S.2d 366 (1st Dep't 1953).

¹¹³ *Matter of Rimco Trading Corp.*, 129 N.Y.L.J. 224, col. 4 (Sup. Ct. Jan. 21, 1953). See also *Minskoff v. Rhean Builders Corp.*, 282 App. Div. 918, 125 N.Y.S.2d 344 (4th Dep't 1953).

¹¹⁴ N.Y. Stock Corp. Law § 58; N.Y. Penal Law § 664(2).

¹¹⁵ *Friedman v. Video Television, Inc.*, 281 App. Div. 817, 118 N.Y.S.2d 844 (1st Dep't 1953).

¹¹⁶ *Wright Lumber Co. v. Herron*, 199 F.2d 446 (10th Cir. 1953) (cancellation of sales contract not submitted to arbitrators for determination). This question of exceeding the jurisdiction in making the particular award is "actually an issue similar to the

award which are invalid as exceeding the limits of the submission may be stricken out by the court when, *e.g.*, an arbitrator finds no cause for discharge of an employee, but for "suspension" and for "disciplinary action," which questions the parties had not asked the arbitrator to decide.¹¹⁷

Such challenge of award on the ground that the arbitrator exceeded his authority was maintained, *e.g.*, in a construction arbitration where the contract provided as consideration for the contractor's performance, in lieu of money, the transfer of a parcel of realty in Los Angeles, California. An award granting a sum of money was therefore vacated since the contract in unambiguous language provided for transfer of a specific parcel of real property and did not intend to authorize future arbitrators to award something else.¹¹⁸ An award was likewise vacated in a Connecticut arbitration where the arbitrator was required by the submission to decide on a direct wage decrease of nine and three-fourths cents per hour to offset a prior wage increase, and not, as he did, on a varied application of the decrease.¹¹⁹

It is obvious that confirmation has to be sought within the statutory time limit (one year under the Wisconsin Arbitration Statute, Section 298.09),¹²⁰ but the winning party is not precluded from obtaining beforehand a warrant of attachment, since the award, though not confirmed, gave rise to a cause of action for its enforcement sufficient to support the warrant of attachment.¹²¹

The challenge of an award has likewise to be made within the statutory time limits (three months after delivery of the award, Section 1463 of the New York Civil Practice Act) and no collateral attack is possible, especially in lease arbitration, when the parties adopted the terms of the award.¹²²

preliminary issue of arbitrability of the dispute." Johnson, Book Review, 5 Stan. L. Rev. 858 (1953).

¹¹⁷ *Fulton Markets, Inc. v. Amalgamated Meat Cutters and Butcher Workmen*, Conn. Super. Ct., New Haven County, No. 19997, Dec. 30, 1952, digested in 8 Arb. J. 62 (1953). On the arbitrator's authority to determine the recapture of unemployment insurance benefits, see Gray, Back Pay Awards and Unemployment Insurance Benefits, 8 Arb. J. 114 (1953).

¹¹⁸ *Stein v. Drake*, 116 Cal. App.2d 779, 254 P.2d 613 (1953).

¹¹⁹ *Textile Workers Union v. Cheney Brothers*, 20 Lab. Arb. 293 (Conn. Super Ct. 1953).

¹²⁰ *Pick Industries, Inc. v. Gebhard-Berghammer, Inc.*, 264 Wis. 353, 59 N.W.2d 798 (1953). But the one-year limitation in § 9 of the Federal Arbitration Act would not bar the enforcement of the award in a common-law action. *Kentucky River Mills v. Jackson*, 206 F.2d 111 (6th Cir. 1953).

¹²¹ *E. A. Bromund Co. v. Exportadora Alfonso de Albuquerque, Ltda.*, 110 F. Supp. 502 (S.D.N.Y. 1953), referring to the Standard Arbitration Clause of the Inter-American Commercial Arbitration Commission.

¹²² *Heller Candy Co. v. 385 Gerard Ave. Realty Corp.*, 125 N.Y.S.2d 375 (App. Div., 1st Dep't 1953).

Court review of an award as to the facts found by the arbitrator, his interpretation of contract terms, and the law as applied by him, is excluded. This definitely established principle was again affirmed in decisions by courts in New York,¹²³ New Jersey,¹²⁴ Connecticut,¹²⁵ Pennsylvania,¹²⁶ Georgia,¹²⁷ California¹²⁸ and the State of Washington.¹²⁹

The enforcement of arbitral awards, an issue of great practical importance, was recently put in a new light when the Taft-Hartley Act was invoked, not only for enforcement of an arbitration clause under a collective bargaining agreement (as indicated at note 67 *supra* et seq.), but also for the enforcement of awards. Thus, an injunction was sought against a corporation from violating a collective bargaining agreement by its refusal to give effect to an arbitration award which had directed reinstatement with back pay of certain employees. In reversing a dismissal of the union's complaint, the Court of Appeals for the Sixth Circuit¹³⁰ held that the unqualified use of the word "suit" in Section 301(a) of the Taft-Hartley Act authorizes injunctive process for the full enforcement of the substantive rights created by the aforementioned section of that Act.

In international commercial arbitration, the enforcement of foreign awards will be facilitated through the bilateral commercial treaties which were mentioned at note 18 *supra*. Their provision for reciprocal enforcement of arbitration agreements and awards¹³¹ will facilitate the wider use of arbitration for the settlement of commercial controversies which will contribute to the promotion of good trade relations between the United States and the various countries which are parties to the new commercial treaties.

¹²³ Snyder v. Photo-Engravers Board of Trade of New York, Inc., 129 N.Y.L.J. 296, col. 2 (Sup. Ct. Jan. 27, 1953); Compagnie Francaise des Petroles v. Pantepec Oil Co., C.A., 130 N.Y.L.J. 595, col. 4 (Sup. Ct. Sept. 30, 1953); Associated Metals & Minerals Corp. v. Yusek, 130 N.Y.L.J. 877, col. 3 (Sup. Ct. Oct. 26, 1953), *aff'd mem.*, 281 App. Div. 1020, 122 N.Y.S.2d 377 (1st Dep't 1953); Brighton Mills, Inc. v. Rayon Corp. of America, 282 App. Div. 669, 122 N.Y.S.2d 113 (1st Dep't 1953).

¹²⁴ Anco Products Corp. v. T.V. Products Corp., 23 N.J. Super. 116, 92 A.2d 625 (App. Div. 1952).

¹²⁵ Chase Brass & Copper Co. v. Chase Brass & Copper Workers Union, 139 Conn. 591, 96 A.2d 209 (1953).

¹²⁶ Duddy v. Conshohocken Printing Co., 171 Pa. Super. 140, 90 A.2d 394 (1952).

¹²⁷ Whaley v. Ellis, 86 Ga. App. 790, 72 S.E.2d 653 (1952).

¹²⁸ Crofoot v. Blair Holdings Corp., 260 P.2d 156 (Cal. App. 1953).

¹²⁹ Farris v. Alaska Airlines, Inc., 113 F. Supp. 907 (W.D. Wash. 1953).

¹³⁰ Milk & Ice Cream Drivers & Dairy Employees Union v. Gillespie Milk Products Corp., 203 F.2d 650 (6th Cir. 1953).

¹³¹ See, e.g., Art. IV(2) of the Treaty with Japan of April 2, 1953, in force since October 30, 1953, 8 Arb. J. 93 (1953); Gardiner, Japanese Arbitration Law, 8 Arb. J. 89 (1953), and, generally, on the impact of such treaty provisions, Domke, On the Enforcement Abroad of American Arbitration Awards, 17 Law & Contemp. Prob. 545, 549 (1952).

TORTS

JOHN V. THORNTON AND HAROLD F. McNIECE

BECAUSE tort cases turn upon factual questions to a much greater extent than decisions in other fields, few of the thousands of holdings each year are significant. This discussion is limited to those few, and even in these it will be seen that legal principles are largely ground rules to guide jurors.

As would be expected, most leading decisions involved negligence. Florida extended the liability of automobile drivers considerably beyond prior limits, and Wisconsin did likewise for telephone companies. Despite sharp dissents, Indiana continued to restrict attractive nuisance, and the need for a change in Vermont's approach to contributory negligence became apparent. New York further expanded last clear chance, and California applied *res ipsa* in wide sweep. Ohio equated the liability of suppliers and manufacturers, and a deplorable decision construed Connecticut's statute of limitations as applied to manufacturers. On the strict liability side an unusual problem in group defamation came before a federal court, and New Jersey's airplane statute weathered constitutional attack. Other decisions dealt with governmental responsibility for the Texas City disaster, and the wife's action for loss of consortium.

I

INTENTIONAL HARMS

Assault and Battery.—Punitive damages, child of the ancient marriage of torts and criminal law, continues healthy despite alternate condemnation as unjust compensation and praise as a deterrent to wrongs. Tennessee, awarding a wounded man \$10,000, allowed evidence of defendant's financial condition to make sure the sum was "smart money."¹ Missouri went further, sustaining a punitive award of ten times actual damages when a tavern manager squirted ammonia water in an unruly patron's face.² Rejecting a claim of excessiveness, the court, with a dash of dry humor, observed: "Perhaps the jury believed that tavern owners ought to be deterred from

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¹ *Suzore v. Rutherford*, 35 Tenn. App. 678, 251 S.W.2d 129, cert. denied, 251 S.W.2d 129 (1952). Authorities on the issue of the admissibility of evidence of defendant's financial status are collected in Note, 21 St. John's L. Rev. 198 (1947).

² *Cook v. Housewirth*, 254 S.W.2d 283 (Mo., Kansas City App. 1953).

maiming . . . patrons . . . overcome . . . from the products sold by the host."³

Kansas allowed a wrongful death action though decedent had consented to an illegal abortion.⁴ While the cases are in conflict and there is much to be said on both sides,⁵ the present authors agree with the decision. Frequently the woman who goes to the abortionist is under duress, emotional or otherwise. Moreover, holding defendants liable may have some slight deterrent effect in addition to that of the criminal law.

False Imprisonment.—In order to discourage constitutional violations, the federal courts and some states exclude, in criminal prosecutions, evidence which has been illegally obtained by peace officers. A tort suit can serve the same policy, as Mississippi has demonstrated.⁶ Officers entered plaintiff's private property, watched as he illegally sold beer in his house, and arrested him. In holding them liable, the court declared the officers had no right to enter without a warrant and, the evidence of the sale having been obtained unlawfully, the arrest was illegal.

Sometimes an imprisonment is "false" but no one is answerable. One claimant, who sued the state when a judge without jurisdiction imprisoned his daughter, lost out because the judge was not an agent of the state, and, if without jurisdiction, acted on his own.⁷ Another, incarcerated by a judge for violation of probation after expiration of the probationary period, was informed that judicial immunity precluded state responsibility.⁸ These claimants could have sued the judges individually on the theory that they acted totally without jurisdiction. That remedy is inadequate,⁹ however, because imprisoning judges are generally held merely to have committed error in the exercise of jurisdiction, for which no action lies. One judge is understandably reluctant to brand the mistakes of a colleague as entirely without authority. Damages in such instances are usually *absque*

³ Id. at 286.

⁴ Joy v. Brown, 173 Kan. 833, 252 P.2d 889 (1953).

⁵ The Kansas decision was disapproved in 33 B.U.L. Rev. 421 (1953), 26 So. Calif. L. Rev. 472 (1953).

⁶ State for use of Daniel v. McNeel, 64 So.2d 636 (Miss. 1953). This decision and Rager v. McCloskey, 305 N.Y. 75, 111 N.E.2d 214 (1953), bear out the observation in 1952 Annual Surv. Am. L. 652, 28 N.Y.U.L. Rev. 715 (1953), that there may be a tendency afoot to increase the accountability of officers to private citizens.

⁷ Farrell v. State, 204 Misc. 148, 123 N.Y.S.2d 29 (Ct. Cl. 1953).

⁸ Fishbein v. State, 204 Misc. 151, 120 N.Y.S.2d 92 (Ct. Cl.), aff'd, 125 N.Y.S.2d 845 (App. Div., 3d Dep't 1953).

⁹ On rare occasions it is satisfactory, as in Farish v. Smoot, 58 So.2d 534 (Fla. 1952), where punitive damages were awarded against a judge who ordered plaintiff's rearrest with knowledge that he was at liberty on habeas corpus. See Note, 6 U. of Fla. L. Rev. 259 (1953).

injuria; the occasional harm to the individual is the price of an unhesitant judiciary.

Trespass.—The action for trespass also helps keep peace officers on the straight and narrow. In New York an attorney sued a sheriff and his deputy, asserting that the deputy entered plaintiff's office and remained until forcibly removed.¹⁰ It was decided, in accord with settled rules, that the deputy, though he entered rightfully, trespassed by wrongfully refusing to leave. But the decision also held the sheriff liable for this act which he neither directed nor authorized. While unusual, the result is perhaps justifiable in the interests of strict control over public officials.¹¹

Infliction of Mental Suffering.—Courts have held the intentional infliction of mental suffering to be tortious, but usually in cases involving flagrantly outrageous conduct.¹² Iowa has now applied the rule to a somewhat less than outrageous situation.¹³ Defendant, plaintiff's former employer, upon receiving a character inquiry from a subsequent employer, warned plaintiff that if he expected a good recommendation he should discontinue an action which he had commenced against defendant. Plaintiff refused, whereupon defendant wrote an essentially truthful letter to the new employer stating that his association with plaintiff had been unpleasant, and that his advice would be not to sign a contract with plaintiff. Shortly thereafter plaintiff's employment was terminated. He did not allege, however, that defendant maliciously induced the termination;¹⁴ his claim, which the court upheld, was for worry "day and night" between the time

¹⁰ *Rager v. McCloskey*, 305 N.Y. 75, 111 N.E.2d 214 (1953).

¹¹ New York does not exclude illegally obtained evidence in criminal trials. See, e.g., *People v. Defore*, 242 N.Y. 13, 150 N.E. 585 (1926). It is, therefore, of great importance for that state to find other means of checking overzealous officers.

Rager v. McCloskey, 305 N.Y. 75, 111 N.E.2d 214 (1953), also mentioned plaintiff's argument concerning the "prima facie tort" doctrine, a rule still in the process of growth. Plaintiff claimed that even if his complaint did not fall within any of the traditional categories of tort, it should be upheld because "prima facie, the intentional infliction of temporal damages is a cause of action, which . . . requires a justification if the defendant is to escape." *Aikens v. Wisconsin*, 195 U.S. 194, 204 (1904). See also *Advance Music Corp. v. American Tobacco Co.*, 296 N.Y. 79, 70 N.E.2d 401 (1946). It was found unnecessary to pass upon the scope of this doctrine since the allegations of the complaint, apart from those related to slander and trespass, failed to show any actual damage.

¹² E.g., *Johnson v. Sampson*, 167 Minn. 203, 208 N.W. 814 (1926) (accusations of unchastity and threats of imprisonment to high school girl); *Great Atlantic & Pacific Tea Co. v. Roch*, 160 Md. 189, 153 Atl. 22 (1931) (dead rat put in package of groceries); *Clark v. Associated Retail Credit Men of Washington, D.C.*, 105 F.2d 62 (D.C. Cir. 1939) (threats to ruin credit of sick plaintiff).

¹³ *Curnett v. Wolf*, 57 N.W.2d 915 (Iowa 1953).

¹⁴ A recent example of intentional interference with business relations is *Horn v. Sethi*, 95 A.2d 312 (Md. 1953), 39 Va. L. Rev. 833, an action between two real estate brokers.

of defendant's warning and the subsequent discharge. It is doubtful if the mental suffering rule should have been extended to cover this situation, absent malicious inducement of the second employer to discharge plaintiff. Allowance of recovery in such cases encourages neurotic reactions, false claims and trivial suits.

On the other hand, an exception even to the virtually universal rule of no liability for *negligent* infliction of mental suffering might have been justified when a hospital delivered the wrong baby to parents as their progeny.¹⁵ The California court, however, declined to make one. That the plaintiff won in the dubious Iowa case and lost in the seemingly more meritorious California one suggests that some consideration might be given to basing liability in these cases on the serious or trifling character of the injury rather than on the intent or lack of intent of the defendant.

II

NEGLIGENT HARMS

Duty and Proximate Cause.—When a court declares that defendant had a "duty" toward plaintiff, or that defendant's act was the "proximate cause" of plaintiff's damage, it is usually saying no more than that defendant is liable to plaintiff. These catchwords are, for the most part, question-begging, and do not help much in determining *why* defendant is liable. The *why* is generally some vague notion of justice or policy.

Be that as it may, it is clear that defendants' duties are gravitating closer and closer to strict liability. A factor of great magnitude in this movement is the tendency of appellate tribunals to allow "incurably plaintiff-minded" juries¹⁶ to resolve the ultimate issue of how far a defendant's responsibility shall be carried. This tendency seems stronger in urban states, such as New York, but it operates elsewhere as well.

A recent example is a four-to-three Florida decision in a case involving the death of one young boy and the serious injury of another when a large cardboard box in which they were playing was run over by a slow-moving railway express truck.¹⁷ No one testified

¹⁵ *Espinosa v. Beverly Hospital*, 249 P.2d 843 (Cal. App. 1952). Notes, [1953] Wash. U.L.Q. 105, and 10 Wash. & Lee L. Rev. 267 (1953), deal with the related problem of physical injury resulting from nervous shock due to observing negligent acts directed toward a third party. American judges generally deny liability in such situations, unlike their English colleagues. Compare, e.g., *Resavage v. Davies*, 86 A.2d 879 (Md. 1952), discussed in 1952 Annual Surv. Am. L. 643-44, 28 N.Y.U.L. Rev. 706-07 (1953) with *Hambrook v. Stokes Bros.*, [1925] 1 K.B. 141.

¹⁶ The phrase is Prof. Malone's. *The Formative Era of Contributory Negligence*, 41 Ill. L. Rev. 151, 156 (1946).

¹⁷ *Railway Express Agency v. Brabham*, 62 So.2d 713 (Fla. 1952). Florida seems

that the boys were visible but, apparently because of evidence that the box was rolling somewhat and its own belief that the boys might have been visible, the court held for plaintiffs. It opined that a jury could place upon the driver the duty of foreseeing that the box contained animate objects. "Negligence," at least in the Cardozoian sense of action in the face of foreseeable harm, has little meaning when a \$50,000 judgment rests upon such uncertain foundations. This is not to say that the end result is bad. Sound policy often dictates that liability extend beyond the orbit of foreseeable danger, and perhaps the customers of the express agency or its insurer should bear the loss rather than the parents. Probably, however, such a result can be better achieved by recasting accident law in terms of modern needs¹⁸ than by fictionalizing older concepts.

A Wisconsin decision, on the authority of a statute, greatly increases the liability of telephone companies.¹⁹ Plaintiffs alleged that a telephone operator was advised by some unknown person of a fire in the building in which plaintiffs were tenants, but negligently failed to inform the fire department with the result that plaintiffs' merchandise was burned. Demurring, defendant urged that a breach of its duty toward a subscriber gave no action to a third person.²⁰ The demurrer was overruled on the basis that Wisconsin had by statute added a tort duty to the contractual obligation imposed upon telephone companies, and that the tort duty did not require privity.²¹

The traditionally conservative New England states are not so ready as Wisconsin and Florida to formulate new rules.²² They are not reluctant, however, to apply old rules to new instrumentalities as appears from a New Hampshire holding in which an airplane lost

to be in the front ranks of the general trend toward expansion of liability. As noted in 1952 Annual Surv. Am. L. 646-47, 28 N.Y.U.L. Rev. 709-10 (1953), it recently made a storekeeper's duty virtually that of an insurer. *Carl's Markets, Inc. v. De Feo*, 55 So.2d 182 (Fla. 1951).

¹⁸ Some of the present authors' views as to this recasting appear in McNiece & Thornton, *Is the Law of Negligence Obsolete?*, 26 St. John's L. Rev. 255 (1952); McNiece & Thornton, *Automobile Accident Prevention and Compensation*, 27 N.Y.U.L. Rev. 585 (1952).

¹⁹ *Christenson & Arndt, Inc. v. Wisconsin Tel. Co.*, 264 Wis. 238, 58 N.W.2d 682 (1953).

²⁰ See *Mentzer v. New England Tel. & Tel. Co.*, 276 Mass. 478, 177 N.E. 549 (1931), and Note, 78 A.L.R. 654 (1932). An analogous holding is *Reimann v. Monmouth Consolidated Water Co.*, 9 N.J. 134, 87 A.2d 325 (1952), 27 N.Y.U.L. Rev. 872, 26 Temp. L.Q. 214.

²¹ The principal statute relied on was Wis. Stat. § 182.019 (1951): "Persons owning or operating any . . . telephone . . . line . . . for public purposes shall be liable for all damages occasioned by the failure or negligence of their operators, servants or employees in receiving . . . transmitting or delivering messages . . ."

²² See, e.g., *Guitarini v. Macallen Co.*, 95 A.2d 784 (N.H. 1953) (employer of prime contractor not liable to subcontractors for negligence in failing to discover poor financial standing of prime contractor).

out to a horse.²³ The plane's owner was forced to pay for injuries sustained by a child when a horse was frightened by the plane's flying low over a farm community.²⁴

Courts in the foregoing cases generally used the syntax of "duty" to describe their actions in holding defendants liable. Sometimes, however, it is fashionable to speak of "proximate cause," as in the cases of "intervening cause."²⁵ One court, working with "intervening cause," decided that when a driver parked his unlighted truck at night near the improved portion of a highway he was, as to a third party, concurrently negligent with another driver who smashed into the truck.²⁶ No quarrel can be had with the decision.

More difficult is a Nebraska case absolving a defendant whose heavy tractor caused a bridge to collapse.²⁷ Defendant posted inadequate warnings of the collapse, and four days later plaintiff was injured while attempting to drive over the bridge. The prevailing opinion found intervening cause as a matter of law since shortly after the collapse defendant notified the town authorities and was told that they would take care of it. Chief Justice Simmons, dissenting, regarded the negligence of defendant and the public authorities as concurrent.

Attractive Nuisance.—"Attractive nuisance," like duty and proximate cause, poses the question of how far a defendant's responsibility shall be carried. A typical decision branded as an attractive nuisance a dismantled truck allowed to remain on defendant's lot for nearly a year and played with by children for many months before the accident.²⁸ An eight-year-old, with all the inquisitiveness of his age, lighted the inevitable match to examine the inevitable gas tank.

A rift developed in the Indiana Supreme Court when a mother was killed while attempting to rescue her three-year-old boy trapped in defendant's partially completed house.²⁹ The majority found that defendant had no duty to block the entrance despite knowledge that children played there. Chief Justice Emmert, disagreeing, argued that his brethren overlooked the fact that a "dozen old rough boards and

²³ Hoebee v. Howe, 97 A.2d 223 (N.H. 1953).

²⁴ The difficult question whether an elevator company had a tort duty arising out of its service contract with a store was answered affirmatively in Harzfeld's, Inc. v. Otis Elevator Co., 114 F. Supp. 480 (W.D. Mo. 1953) (applying Missouri law).

²⁵ For an analysis of the interchangeability of "duty" and "proximate cause" see Prosser, *Palsgraf Revisited*, 52 Mich. L. Rev. 1 (1953).

²⁶ Wilson v. Edwards, 77 S.E.2d 164 (W. Va. 1953).

²⁷ Shupe v. Antelope County, 157 Neb. 374, 59 N.W.2d 710 (1953).

²⁸ Featherstone v. Freeding, 349 Ill. App. 359, 110 N.E.2d 535 (1953). Cf. Ellison v. Commonwealth Edison Co., 351 Ill. App. 58, 113 N.E.2d 471 (1953) (defendant not liable for boy's drowning in canal abutting his land).

²⁹ Neal v. Home Builders, 111 N.E.2d 280 (Ind. 1953).

a few nails" would have prevented the accident without materially lessening the builder's profits.⁸⁰ Judge Gilkison, also in dissent, placed the cost of protection at fifty cents and deplored the "tragedy" of the law's having "greater respect for the rights of property than for the life and safety of little children."⁸¹ Interesting from a jurisprudential standpoint is the unconventional method used by the dissenters to assail a Holmes decision relied on by the majority.⁸² In an *ad hominem* critique one of them commented that Holmes had no children and reflected "the harshness of the early common law."⁸³ The other called him "a mind incapable of giving to youth . . . proper protection, in a civilized Christian community."⁸⁴

Even without delving into Mr. Justice Holmes's comprehension of children, it may be observed that there is a good deal of merit in the dissenters' views. The instant case, and another recent one,⁸⁵ raise serious doubts as to the wisdom of Indiana's holdings in this area. These doubts are heightened by a Minnesota decision which found an attractive nuisance when a five-year-old was injured in a partially constructed house.⁸⁶ Taking the same tack as the Indiana dissenters, the court observed that defendant could easily have latched or nailed the door, and that the utility of maintaining the condition was negligible in comparison with the risk to children.

Contributory Negligence and Assumption of Risk.—At the same time that the liabilities of defendants are increasing, contributory negligence, "The Draconian rule sired by a medieval concept of causation, out of a heartless laissez-faire,"⁸⁷ is declining in importance. But at this stage it still has plenty of life left. Thus the "range of vision" rule was applied under Louisiana law to make a driver guilty of contributory negligence as a matter of law.⁸⁸ Plaintiff's servant was

⁸⁰ *Id.* at 297.

⁸¹ *Id.* at 299.

⁸² *United Zinc & Chemical Co. v. Britt*, 258 U.S. 268 (1922).

⁸³ *Neal v. Home Builders*, 111 N.E.2d 280, 296 n.2 (Ind. 1953).

⁸⁴ *Id.* at 298.

⁸⁵ *Plotzki v. Standard Oil Co.*, 228 Ind. 518, 92 N.E.2d 632 (1950), 26 Ind. L.J. 266 (1951).

⁸⁶ *Chase v. Luce*, 58 N.W.2d 565 (Minn. 1953). It was noted in last year's Survey that New Jersey law rejected attractive nuisance. 1952 Annual Surv. Am. L. 644, 28 N.Y.U.L. Rev. 707 (1953). This is no longer true. *McGill v. United States*, 200 F.2d 873 (3d Cir. 1953), on the authority of *Strang v. South Jersey Broadcasting Co.*, 9 N.J. 38, 86 A.2d 777 (1952), held the Government liable to a seven-year-old child injured on an abandoned coast guard tower. The federal court insisted that it was "not talking about the 'attractive nuisance' doctrine," 200 F.2d 873, 875 (3d Cir. 1953), but it reached the same result.

⁸⁷ James, *Contributory Negligence*, 62 Yale L.J. 691, 704 (1953).

⁸⁸ *Smith v. Fidelity Mut. Ins. Co.*, 206 F.2d 549 (5th Cir. 1953). See also *United States Fidelity & Guaranty Co. v. McCullough*, 202 F.2d 269, 270 (5th Cir. 1953). Nebraska's rule is the same. *Union Pacific R.R. v. Denver-Chicago Trucking Co.*, 202 F.2d 31, 35 (8th Cir. 1953).

blinded by the lights of an approaching automobile but did not slow down. As luck would have it, defendant's truck, with no reflectors or tail light, was stopped temporarily ahead and a collision ensued. A directed verdict for defendant was upheld. It is likely that most courts would have regarded the case as presenting a question of fact. With the modern tendency to let the jury pass upon most issues, the range-of-vision rule has declined as a principle of law and is now usually no more than a flexible guide for the triers of fact. More in line with present-day views is another court's opinion that, "It cannot 'be said that the failure to see an unlighted object within the range of one's headlights is negligence per se.'"³⁹

Also demonstrative of the fact that contributory negligence is not quite a dodo in the evolutionary process is a decision which found such negligence as a matter of law and voided a \$160,000 verdict.⁴⁰ Plaintiff, while assisting in waterproofing a crate in a railroad yard, contacted a high tension wire. He knew that the wire, if alive, would be dangerous but failed to inquire whether it had been de-energized.

The grave difficulty under which a wrongful death plaintiff labors when state law places upon him the burden of proving decedent's freedom from contributory negligence is evident from a decision applying Vermont law.⁴¹ A pedestrian was killed by a truck under circumstances justifying submission to the jury of the issue of defendant's negligence. But the court could find no basis for an inference that decedent examined traffic conditions and held defendant entitled to a directed verdict. Many states, such as New York,⁴² place the burden of proving contributory negligence on the defendant when the victim's mouth is stilled in death, and the justice of this procedure seems clear. It took a case like this⁴³ to change Connecticut's rule,⁴⁴ and Vermont may follow suit.

That a patron assumes risks obviously attendant upon an amuse-

³⁹ *Peigh v. Baltimore & O.R.R.*, 204 F.2d 391, 395 (D.C. Cir. 1953) (boxcar in street on rainy night). As to the doubtful status of North Carolina's rule, see *Rosenblatt v. United States*, 112 F. Supp. 114 (E.D.N.C. 1953) (failure to see wrecker stopped on highway not contributory negligence as matter of law).

⁴⁰ *Stoffel v. New York, N.H. & H.R.R.*, 205 F.2d 411 (2d Cir. 1953) (applying New York law).

⁴¹ *Cummings v. Whitney*, 203 F.2d 354 (2d Cir. 1953). See James, *Contributory Negligence*, 62 *Yale L.J.* 691, 729-31 (1953), observing that the overwhelming weight of authority puts on defendant the burden of pleading and proving contributory negligence.

⁴² *N.Y. Decedent Estate Law* §§ 119, 131.

⁴³ *Kotler v. Lalley*, 112 Conn. 86, 151 Atl. 433 (1930). The case was notable for the vigorous dissent of Wheeler, C.J., urging the court itself to change the rule of burden of proof.

⁴⁴ Conn. Rev. Gen. Stat. § 7836 (1949).

ment device has been restated in a case involving a "Double Loop-O-Plane."⁴⁵ Thus, though the doctrine of assumption of risk is no longer the vital principle it once was, "The timorous may stay at home" is still the law in some jurisdictions.⁴⁶

Last Clear Chance.—In effect last clear chance allows the jury to compare negligence and find for a plaintiff who has been less careless than a defendant. To the extent that it is a way station on the road to apportionment of damages between a negligent plaintiff and a negligent defendant,⁴⁷ the doctrine may be a salutary one. The difficulty is, however, that by taking care of some "hard" cases, it masks the perniciousness of contributory negligence and perhaps delays the transition to the rational solution of apportionment. Moreover, as contributory negligence unjustly inflicts upon plaintiff the whole burden of a loss occasioned by the negligence of plaintiff and defendant, so last clear chance unjustly thrusts that loss upon defendant.

It is not surprising that New York which is always prone to allow the general issue of contributory negligence to be resolved by the fact finders is also quick to apply last clear chance. In an important case that state further expanded its already broad rule.⁴⁸ A subway train was stopped by a tripping device located on each car and actuated by striking an object in the roadbed. Without investigating, the motorman proceeded. The train stopped again after a car's length, but the motorman went on as before. After another car's length the train stopped a third time, and the motorman finally investigated and found the body of plaintiff's decedent. While recognizing the absence of actual knowledge of the situation, the court applied last clear chance because there was "negligence so reckless as to betoken indifference to knowledge." The decision is another

⁴⁵ *Vance v. Obadal*, 256 S.W.2d 139 (Tex. Civ. App. 1953). See also *Knowles v. Roberts-At-The-Beach Co.*, 115 Cal. App.2d 196, 251 P.2d 389 (1953) (assumption of risk a jury question where thirty-year-old woman-patron of restaurant participated in hobbyhorse race); *Schentzel v. Philadelphia National League Club*, 173 Pa. Super. 179, 96 A.2d 181 (1953) (assumption of risk of being struck by foul ball as a matter of law where mature woman attended first baseball game).

⁴⁶ The quotation is from Cardozo, J., in *Murphy v. Steeplechase Amusement Co.*, 250 N.Y. 479, 483, 166 N.E. 173, 174 (1929). For the effect of the rescue doctrine upon assumption of risk and contributory negligence see *Parnell v. Security Elevator Co.*, 174 Kan. 643, 258 P.2d 288 (1953). Professor James comments that the term assumption of risk "adds nothing to modern law except confusion" and should be abolished as the product of an outmoded individualism. James, *Assumption of Risk*, 61 *Yale L.J.* 141, 169 (1952).

⁴⁷ See James, *Last Clear Chance: A Transitional Doctrine*, 47 *Yale L.J.* 704 (1938).

⁴⁸ *Kumkumian v. City of New York*, 305 N.Y. 167, 111 N.E.2d 865 (1953), 28 *St. John's L. Rev.* 136. Only a few years before, the court held in *Chadwick v. City of New York*, 301 N.Y. 176, 93 N.E.2d 625 (1950) that, to invoke last clear chance, it need not appear that defendant knew the exact nature of the danger and the particular individual threatened so long as he knew that someone was in peril.

example of the use of a "should have known" test in place of the actual knowledge which the doctrine traditionally requires. It may truly be said that the last chance is seldom a clear one any more.

Other decisions applied the doctrine to collisions between an auto and a bus,⁴⁹ and an auto and a train;⁵⁰ to an accident involving a pedestrian and an auto,⁵¹ and to the case of a truck which backed over the foot of a workman.⁵² It was refused application to a collision between two trucks.⁵³

Res Ipsa Loquitur.—The "principle" of *res ipsa* is generally regarded as nothing more than the rule of circumstantial evidence, and it has been said that if that phrase had not been in Latin, no one would have called it a principle.⁵⁴ A typical statement of the rule is that a defendant may be held responsible where it is reasonable for a jury to infer, on the basis of common experience, that the occurrence, more probably than not, was due to his negligence. In recent years, however, courts have been exceedingly liberal in permitting such inferences, and now plaintiffs frequently get to juries with accidents that only whisper for themselves. To that extent *res ipsa* has helped expand defendants' liabilities, even though in theory it does not shift the burden of proof to the defendant.⁵⁵

The sequel to the well-known *Manley v. New York Telephone Co.* case⁵⁶ has appeared in *Seeley v. New York Telephone Co.*⁵⁷ In the

⁴⁹ *Daniels v. San Francisco*, 255 P.2d 785 (Cal. 1953) (plaintiff's car, driven onto highway from side road, struck by bus). The case seems wrongly decided. As Justice Schauer says, it makes the doctrine "not one of last clear chance but one of last possible chance." *Id.* at 794. Cf. *Miami Transit Co. v. Goff*, 66 So.2d 487 (Fla. 1953), refusing to apply last clear chance in a somewhat similar situation.

⁵⁰ *Underwood v. Illinois Cent. R.R.*, 205 F.2d 61 (5th Cir. 1953) (applying Mississippi law). Cf. *Zawacki v. Pennsylvania R.R.*, 374 Pa. 89, 97 A.2d 63 (1953), refusing to hold a railroad liable where the engineer looked but did not see plaintiff's truck on the tracks.

⁵¹ *Lincoln v. Tarbell*, 95 A.2d 778 (N.H. 1953) (defendant saw decedent at least 150 feet away and sounded his horn but did not slow down). The decision appears proper, as does *Cox v. Thompson*, 254 P.2d 1047 (Utah 1953), where the doctrine was refused application when a pedestrian suddenly stepped into the path of an oncoming car.

⁵² *Perin v. Nelson & Sloan*, 259 P.2d 959 (Cal. App. 1953). The driver erroneously "figured that he had plenty of room to back up" but, since he knew the facts of plaintiff's situation, he could not, said the court, rely on his dullness in failing to appreciate the peril presented by those facts.

⁵³ *Patterson v. George F. Alger Co.*, 112 N.E.2d 65 (Ohio App. 1952).

⁵⁴ Jaffe, *Res Ipsa Loquitur Vindicated*, 1 Buff. L. Rev. 1, 13 (1951), takes issue with the usual analysis, and there is a good deal to be said for his position that *res ipsa* operates "somewhere between a rational circumstantial case on the one hand and a shift of the burden of proof or change in liability on the other."

⁵⁵ *Cie. Des Messageries Maritimes v. Tawes*, 205 F.2d 5 (5th Cir.), cert. denied, 346 U.S. 858 (1953) (where, upon all the evidence, the falling of a stepladder remains unexplained, plaintiff must fail).

⁵⁶ 303 N.Y. 18, 100 N.E.2d 113 (1951), noted in 1951 Annual Surv. Am. L. 755.

⁵⁷ 281 App. Div. 285, 120 N.Y.S.2d 262 (3d Dep't 1953). Another recent telephone-shock case is *Kamper v. United Tel. Co.*, 259 S.W.2d 801 (Mo. 1953).

first case Manley, Seeley's employee, answered a telephone call from his employer and was "knocked out." His complaint was dismissed for failure to make out a prima facie case of injury from excessive current on defendant's telephone line, the court noting that Manley "never once said he felt an *electric shock*." Now Seeley has recovered upon his own statement that he felt "a sensation of electricity" and Manley's testimony that he "received an electric shock." Res ipsa was held applicable. Had Manley testified in his own case as he did in Seeley's, very probably he also would have been a successful litigant. It is unfortunate that the inevitable imperfections of the judicial process result in logically inconsistent decisions like these.

California again applied res ipsa to a group situation in which no individual had exclusive control over the injurious instrumentality but all of whom together did.⁵⁸ Plaintiffs sued the manufacturer of a contaminated DDT solution and all who participated in spraying it by airplane over their cotton fields. Not unexpectedly, the jury found against the manufacturer, which had the misfortune of being a large corporation, and exonerated the others.

The rather rare problem of res ipsa in a third party proceeding arose when a plaintiff was injured in defendant department store, allegedly because a store employee stopped an escalator suddenly.⁵⁹ The store impleaded the escalator company as third party defendant, asserting that it caused any such stop. The conclusion reached was that res ipsa applied in favor of the injured party against the store but, since the impleaded defendant did not have exclusive control, the store was obliged to prove affirmatively any cause of action against it. The result seems correct although the "exclusive control" language is unfortunate. There are many cases where an occurrence points to defendant's negligence even though he did not have exclusive control, or any control at all, and it is more accurate to say simply that the indicated cause of the accident must be one for which defendant is responsible.

Michigan, while verbally repudiating it,⁶⁰ seemingly went right ahead and applied res ipsa when a taxicab caused another auto to strike pedestrians.⁶¹ The court preferred to speak of circumstantial evidence—and it may have acted wisely in bypassing the mysterious

⁵⁸ *Burr v. Sherwin-Williams Co.*, 258 P.2d 58 (Cal. App. 1953). The landmark case applying the rule against several persons is *Ybarra v. Spangard*, 25 Cal.2d 486, 154 P.2d 687, 162 A.L.R. 1258 (1944) where a patient who received injuries while unconscious sued all those who had any control over his body.

⁵⁹ *Stafford v. Sibley, Lindsay & Curr Co.*, 280 App. Div. 495, 114 N.Y.S.2d 177 (4th Dep't 1952).

⁶⁰ *Fish v. Grand Trunk Western Ry.*, 275 Mich. 718, 269 N.W. 568 (1936).

⁶¹ *Spiers v. Martin*, 336 Mich. 613, 58 N.W.2d 821 (1953).

Latin—but the net effect was a *res ipsa* case. Analogous verbal confusion prevailed in Pennsylvania. That state, without either clarifying or repudiating its tenuous distinction between the doctrine of *res ipsa* and that of exclusive control,⁶² straddled by holding that a plaintiff was entitled to invoke both those rules when a ginger ale bottle exploded.⁶³

The question, unsettled in a number of jurisdictions, whether a plaintiff can attempt to prove specific negligence and still rely on *res ipsa* has again been answered in the negative in Arkansas⁶⁴ and Missouri.⁶⁵ A better approach might be to apply *res ipsa* in such cases to the extent of permitting the inference to be drawn in support of the proof of specific acts though not generally.⁶⁶

III

STRICT LIABILITY

Defamation.—Words directed at a class create a troublesome problem. Obviously everyone in the world cannot sue when a misanthrope hurls abuse at humanity, but the old question of degree arises as the defamed group narrows. Then line-drawing begins, as in *Neiman-Marcus v. Lait*.⁶⁷

In that case the book *U.S.A. Confidential* stated that "some" of the models employed by a Texas department store were "call girls—the top babes in town," and that the salesgirls were "good, too—pretty, and often much cheaper." Unappreciative of these dubious compliments, the store, nine models who constituted the entire group, and thirty saleswomen out of some four hundred summoned the authors to court. Also plaintiffs were fifteen salesmen out of twenty-five who

⁶² There is some authority that Pennsylvania limits *res ipsa* to cases where contractual relationships exist, but does not so limit the "exclusive control" rule. See *Sierodinski v. E.I. DuPont de Nemours & Co.*, 118 F.2d 531 (3d Cir. 1941); *Ambrose v. Western Maryland Ry.*, 368 Pa. 1, 11, 81 A.2d 895, 900 (1951).

⁶³ *Loch v. Confair*, 372 Pa. 212, 93 A.2d 451 (1953). Another exploding bottle case applying the doctrine is *Johnson v. Louisiana Coca-Cola Bottling Co.*, 63 So.2d 459 (La. App. 1953). A verdict for plaintiff was sustained on ordinary negligence principles in *Saporito v. Purex Corp.*, 40 Cal.2d 608, 255 P.2d 7 (1953), where a bottle of bleaching solution exploded, though a concurring justice would have based the holding upon *res ipsa*.

⁶⁴ *Reece v. Webster*, 256 S.W.2d 345 (Ark. 1953) (explosion of tractor). The rule is otherwise in Texas. *Gulf Refining Co. v. Delavan*, 203 F.2d 769, 771 (5th Cir. 1953).

⁶⁵ *Elder v. Phillip*, 252 S.W.2d 656 (Mo. App. 1952). See also *Williams v. St. Louis Public Service Co.*, 253 S.W.2d 97 (Mo. 1952).

⁶⁶ Another *res ipsa* case of some consequence is *Kerlin v. Washington Gas Light Co.*, 110 F. Supp. 487 (D.D.C. 1953), invoking the doctrine when a pedestrian was struck by an object propelled from the vicinity of a street excavation. The opinion contains a good history of the rule.

⁶⁷ 13 F.R.D. 311 (S.D.N.Y. 1952).

complained of the remark that "most" of the men's sales staff were "fairies." On defendants' motion to dismiss as to the salesmen and saleswomen, the court held the complaint sufficient as to the salesmen since an "imputation of gross immorality to *some* of a small group casts suspicion upon all," but deficient as to the saleswomen because "where the group . . . is a large one, absent circumstances pointing to a particular plaintiff as the person defamed, no individual member . . . has a cause of action."⁶⁸ The decision seems both in line with precedent,⁶⁹ and correct.⁷⁰ One is inclined to be sympathetic toward members of a large group who allege damage through irresponsible reporting but, on reflection, it does not seem reasonable to say that the average reader would regard such a broad charge as referring to any individual.

In line with cases noted in last year's *Survey*⁷¹ another decision held that orally calling plaintiff a communist is not slander per se.⁷² While recognizing that such a written publication would be libelous,⁷³ the court frankly stated that the "cold war" required a different holding as to slander.

Our safety is . . . best served by an exposure of communists and communism. It is far better, therefore, to allow free play of our emotions in dealing with persons whom we believe to be communists rather than seal the lips of people who might be frightened into silence and suppression lest use of the word "communist" should per se force upon them costly litigation.⁷⁴

One's reaction to the decision is dependent upon acceptance or rejection of the court's policy views. At least, however, much can be said for the opposite premise that, when the cold war has made "communist" a most stinging charge, one uttering the epithet should be ready to back it up.

Two cases considered the anomaly in the New York law of slander which permits people to be called "crooks" in Manhattan without per se liability while the same characterization creates such

⁶⁸ *Id.* at 315, 316.

⁶⁹ Actions have been allowed for defamation of relatively small groups. Representative are *Gross v. Cantor*, 270 N.Y. 93, 200 N.E. 592 (1936) (twelve radio editors); *Chapa v. Abernethy*, 175 S.W. 166 (Tex. Civ. App. 1915) (*posse*). But suits against large classes have generally failed. See, e.g., *Fowler v. Curtis Publishing Co.*, 78 F. Supp. 303 (D.D.C. 1948), *aff'd*, 182 F.2d 377 (D.C. Cir. 1950) (all taxi drivers in Washington); *Noral v. Hearst Publications, Inc.*, 40 Cal. App.2d 348, 104 P.2d 860 (1940) (162 officials of a union).

⁷⁰ Several difficult procedural and choice-of-law questions were also involved in the case but they are not passed upon here.

⁷¹ 1952 Annual Surv. Am. L. 656, 28 N.Y.U.L. Rev. 719 (1953).

⁷² *Keefe v. O'Brien*, 203 Misc. 113, 116 N.Y.S.2d 286 (Sup. Ct. 1952).

⁷³ *Mencher v. Chesley*, 297 N.Y. 94, 75 N.E.2d 257 (1947).

⁷⁴ *Keefe v. O'Brien*, 203 Misc. 113, 114, 116 N.Y.S.2d 286, 288 (Sup. Ct. 1952).

liability in Brooklyn.⁷⁵ Unfortunately the net effect of the decisions is to compound the confusion. Now "crook" is not slander per se in the first judicial department,⁷⁶ but is in the second department⁷⁷ except for one county therein.⁷⁸

A rather novel situation at a Florida dog-racing track was passed upon.⁷⁹ The female plaintiff and a friend, enthusiasts of the sport, habitually bought "split" tickets to bet on the races, each contributing half the price. Their ticket won, but, when they sought payment, defendant's agent asked, "What man's pocket did you pick this out of?" and added, "I'm not cashing any ticket for any stoop." The picturesque term "stoop" describes one who picks tickets from the ground and cashes them as his own. The court sustained a directed verdict on the "pickpocket" count because uttering the words in the presence of plaintiff's coadventurer was not a publication,⁸⁰ and a dismissal on the "stoop" count since the word was not slanderous per se and no special damages were alleged.⁸¹

Privilege was the defense when an insurance company lawyer, while interviewing a prospective witness in an action on fire policies, stated that plaintiff "set the fire and burned up her husband."⁸² The court correctly held the conversation relevant to the issues about to be tried and qualifiedly privileged. The interests of justice require that attorneys be free of apprehension of future lawsuits when they are interrogating possible witnesses. A similarly sound policy prompted Idaho to apply privilege to protect counsel who, in a letter to the court in connection with a suit, made defamatory statements concerning an attorney for whom he had been substituted.⁸³ The judicial privilege was upheld in a case which denied liability on the part of

⁷⁵ *Villemin v. Brown*, 193 App. Div. 777, 184 N.Y. Supp. 570 (1st Dep't 1920) ("crook" not slander per se); *Weiner v. Leviton*, 230 App. Div. 312, 244 N.Y. Supp. 176 (2d Dep't 1930) ("crook" is slander per se).

⁷⁶ *Villemin v. Brown*, supra note 75.

⁷⁷ *Weiner v. Leviton*, 230 App. Div. 312, 244 N.Y. Supp. 176 (2d Dep't 1930); *Lendino v. Florenza*, 203 Misc. 115, 115 N.Y.S.2d 160 (Sup. Ct. 1952).

⁷⁸ *Mishkin v. Roreck*, 202 Misc. 653, 115 N.Y.S.2d 269 (Sup. Ct. 1952).

⁷⁹ *Campbell v. Jacksonville Kennel Club*, 66 So.2d 495 (Fla. 1953).

⁸⁰ Analogous is the holding in *Mims v. Metropolitan Life Ins. Co.*, 200 F.2d 800 (5th Cir. 1952), cert. denied, 345 U.S. 940 (1953), applying New York law, that dictation by a corporate agent to a corporate stenographer is not publication. The *Mims* case is unfavorably commented upon in 27 Temp. L.Q. 127 (1953).

⁸¹ An interesting libel case is *Garlepy v. Pearson*, 207 F.2d 15 (D.C. Cir.), cert. denied, 346 U.S. 909 (1953). Drew Pearson broadcast that defendant in an income tax prosecution claimed that a clergyman had given him money because of the clergyman's alienation of the affections of defendant's wife. In a suit brought by the wife it was held a jury question whether the statement impugned the wife's chastity.

⁸² *Robinson v. Home Fire & Marine Ins. Co.*, 59 N.W.2d 776 (Iowa 1953).

⁸³ *Richeson v. Kessler*, 73 Idaho 548, 255 P.2d 707 (1953). Cf. *Pittsburgh Courier Publishing Co. v. Lubore*, 200 F.2d 355 (D.C. Cir. 1952), noted in [1953] Wash. U.L.Q. 224 (newspaper not protected by qualified privilege afforded reporting of judicial pro-

a judge for alleged defamation in an opinion published in the *New York Law Journal*.⁸⁴ The decision seems to reach a desirable result.⁸⁵

Right of Privacy.—New York gives a cause of action to one whose name or likeness is used commercially without consent.⁸⁶ This right of privacy, like that established in twenty-one other states,⁸⁷ is personal and nonassignable.⁸⁸ Now, in a well-reasoned case which is the first to recognize expressly a "right of publicity," the complaint of a bubblegum manufacturer, who had contracted with baseball stars for the exclusive use of their photographs in connection with the sale of gum, was sustained under New York law against a competitor who was making similar use of the photographs.⁸⁹ The exclusive contracts transferred the players' "right of publicity" to plaintiff.

Ultrahazardous Activities.—*Rylands v. Fletcher*,⁹⁰ of revered memory, played a part in deciding an action against a Utah mine owner for flood damage caused by water from mining tunnels. The court held the *Rylands* rule inapplicable because defendant did not store water on its premises or knowingly permit an accumulation there.⁹¹

The most significant decision sustained, against due process and other charges, the constitutionality of the New Jersey aviation statute in a case growing out of three plane crashes at Elizabeth.⁹² This law makes the "owner of every aircraft . . . absolutely liable for injuries to persons or property on the land or water beneath, caused by ascent, descent, or flight of the aircraft, or the dropping or falling of any object therefrom, whether such owner was negligent or not, unless the injury is caused in whole or in part by the negligence of the person

ceeding where it published charges contained in affidavit to district attorney). In *Taylor v. Glotfelty*, 201 F.2d 51 (6th Cir. 1952), plaintiff, an inmate of a medical center for federal prisoners, charged that the psychiatrist there libeled him by pronouncing him to be suffering from paresis as a result of which he was confined in a ward for the insane. The court held that, since these acts were done in discharge of the psychiatrist's official duties, he was not liable for a mistake even if he acted from ulterior motives.

⁸⁴ *Bradford v. Pette*, 129 N.Y.L.J. 2021, col. 6 (Sup. Ct. June 16, 1953), 28 St. John's L. Rev. 129.

⁸⁵ Cf. *Murray v. Brancato*, 290 N.Y. 52, 48 N.E.2d 257 (1943).

⁸⁶ N.Y. Civ. Rights Law § 51. A recent case dealing with the statute is *Oma v. Hillman Periodicals, Inc.*, 281 App. Div. 240, 118 N.Y.S.2d 720 (1st Dep't 1953) (magazine published photograph of pugilist in connection with article "Let's Abolish Boxing").

⁸⁷ The authorities are collected in Note, 62 Yale L.J. 1123 (1953).

⁸⁸ *Pekas Co. v. Leslie*, 52 N.Y.L.J. 1864 (Sup. Ct. Feb. 13, 1915).

⁸⁹ *Haelan Laboratories v. Topps Chewing Gum Co.*, 202 F.2d 866 (2d Cir. 1953), 66 Harv. L. Rev. 1536.

⁹⁰ L.R. 1 Ex. 265 (1866), aff'd, L.R. 3 H.L. 330 (1868).

⁹¹ *Zampos v. United States Smelting, Refining and Mining Co.*, 206 F.2d 171 (10th Cir. 1953).

⁹² *Prentiss v. National Airlines*, 112 F. Supp. 306 (D.N.J. 1953).

injured, or of the owner or bailee of the property injured.⁹³ The court, pointing out that the *Restatement of Torts* classifies aviation as ultrahazardous,⁹⁴ realistically observed that the "underlying purpose of the Act was to place the cost of the dangers of the enterprise upon the industry itself—a technique, the validity of which is well established by the nation-wide theory of workmen's compensation."⁹⁵ It thereupon held that, since the common law validly imposes absolute liability for damages to persons and property on the ground through airplane crashes,⁹⁶ a fortiori such liability may be decreed by the legislature.

Nuisance.—The understatement of the year is a recent opinion's remark: "There is much uncertainty in the law in dealing with nuisances and with their classification."⁹⁷ Probably no other area is so fraught with confusion.

As is often the practice where courts do not fully comprehend a problem, there is a growing tendency to submit everything to the jury under a nebulous charge of "reasonableness." Thus a drive-in theater was held a nuisance because, though legally established, a jury decided it was conducted unreasonably and injured nearby landowners.⁹⁸ Another jury found a nuisance where defendants' lawful mining operation was carried on unreasonably.⁹⁹ The latter case had tremendous jury appeal since plaintiffs' white house became a black house thanks to defendants' chemicals.¹⁰⁰ One's heart goes out to the man who lives next door to a drive-in theater or a coal mine. But rational solutions should, it would seem, be found in over-all city planning by experts rather than in piecemeal adjudications by juries.

A decision holding that double-parking is a public nuisance has

⁹³ N.J. Stat. Ann. § 6:2-7 (Supp. 1953). The New Jersey statute does not apply to passengers. It was first enacted in 1929 after having been promulgated by the National Conference of Commissioners on Uniform State Laws as a proposed Uniform State Law for Aeronautics. This proposed Act was withdrawn by the National Conference in 1938 and replaced by other suggested legislation imposing a similar absolute liability, but extending such liability in favor of passengers as well. The difficulties of establishing a negligence case when a passenger is killed are illustrated by *In Re Hayden's Estate*, 174 Kan. 140, 254 P.2d 813 (1953), which is also important as holding that the Kansas "guest statute" (Kan. Gen. Stat. § 8-122b [1949]) is not applicable to airplane accidents.

⁹⁴ Section 520, comment b.

⁹⁵ *Prentiss v. National Airlines*, 112 F. Supp. 306, 310 (D.N.J. 1953).

⁹⁶ See, e.g., *Guille v. Swan*, 19 Johns. 381 (N.Y. 1822); *Rochester Gas & Electric Corp. v. Dunlop*, 148 Misc. 849, 266 N.Y. Supp. 469 (County Ct. 1933).

⁹⁷ *Waschak v. Moffat*, 96 A.2d 163, 166 (Pa. Super. 1953).

⁹⁸ *Brusklund v. Oak Theater*, 254 P.2d 1035 (Wash. 1953).

⁹⁹ *Waschak v. Moffat*, 96 A.2d 163 (Pa. Super. 1953).

¹⁰⁰ Similar to the drive-in and mine cases is *Laurel Equipment Co. v. Matthews*,

⁶⁷ So.2d 258 (Miss. 1953) where a jury found a paint shop to be a nuisance.

been reversed by a higher court.¹⁰¹ Here again, while the first impulse is to disagree with the reversal, it must in the long run be recognized that nuisance law is inadequate to handle what is essentially a traffic problem for experts.

IV

SPECIAL RELATIONSHIPS AFFECTING LIABILITY

Domestic Relations: (a) Master and Servant.—Contrasting decisions illustrate the nice distinction between “within” and “without” the scope of employment. In one case, a bus driver, following a collision, asked to see a truck driver’s license and was answered with a punch in the nose.¹⁰² When the bus driver bent down to get the truck’s license number, the still irate truckman continued the conversation with a kick in the face. The truckman’s employer was exonerated, however, on the basis that his employee’s action was something more than imperfect performance of the duty to show his license, and amounted to a wilful departure from employment.¹⁰³ Still another holding absolved the owner of a wrestling arena when a wrestler leaped from the ring and manhandled spectators.¹⁰⁴

On the other hand, a complaint was held sufficient which alleged that an overzealous doorman in defendant’s night club shot and killed a patron who didn’t go home fast enough when ordered to leave.¹⁰⁵ The court noted that defendant gave the doorman “discretion to determine who should enter . . . or be turned away . . . and a pistol to enforce his decisions.”¹⁰⁶ This decision seems more in line with the current trend toward a broad interpretation of the employment relation.

A well-considered Tennessee opinion laid down the rule that a parking-lot operator was responsible for negligent injury to an

¹⁰¹ *Harnik v. Levine*, 202 Misc. 648, 115 N.Y.S.2d 25 (Sup. Ct. 1952), rev’d, 281 App. Div. 878, 120 N.Y.S.2d 62 (1st Dep’t 1953).

¹⁰² *Sauter v. New York Tribune*, 305 N.Y. 442, 113 N.E.2d 790 (1953).

¹⁰³ Similar in facts and result is *Oklahoma Ry. v. Sandford*, 258 P.2d 604 (Okla. 1953) (bus driver who allegedly assaulted driver of automobile while detaining him for arrest not acting in course of employment).

¹⁰⁴ *Ramsey v. Kallio*, 62 So.2d 146 (La. App. 1952).

¹⁰⁵ *Prince v. Brickell*, 87 Ga. App. 697, 75 S.E.2d 288 (1953). To similar effect is *Tarman v. Southard*, 205 F.2d 705 (D.C. Cir. 1953) (cab driver who knocked plaintiff down in dispute over fare acting in course of employment). Cf. *Bastine v. Atlantic Coast Line R.R.*, 205 F.2d 457 (5th Cir. 1953), where a jury found for the railroad when one railroad employee was shot by another, and rejected contentions that the fellow employee was of unsound mind and that the railroad knew or should have known this.

¹⁰⁶ *Prince v. Brickell*, 87 Ga. App. 697, 700, 75 S.E.2d 288, 291 (1953). In *United States v. Stewart*, 201 F.2d 135 (5th Cir. 1953) the Government was held liable under the Tort Claims Act to a plaintiff who was struck by a bullet fired by a Border Patrol inspector to frighten away barking dogs which were disturbing him as he wrote a report.

automobile by his employee even though it occurred while the employee was on a frolic of his own.¹⁰⁷ The decision rests strictly on policy grounds, as appears from the court's statement:

In modern times the motorist puts his automobile in the hands of a garage keeper or parking lot operator for safe keeping almost daily The parking lot or garage is almost always in charge of an employee. The automobile owner is therefore at the mercy of the garage keeper's servants. To allow the garage keeper to escape liability for the unauthorized tort of his servant would . . . be a failure of justice.¹⁰⁸

Domestic Relations: (b) Husband and Wife.—Illinois has joined the trend toward allowance of tort actions between spouses.¹⁰⁹ Its supreme court, relying on the Married Women's Act,¹¹⁰ rejected arguments that such suits disrupt domestic tranquillity and encourage collusion against the insurer. Unlike Illinois, Georgia is unwilling to let one spouse sue another, but it did rule, in a case of first impression, that a wife, injured by her husband's gross negligence, could sue the employer for whom the husband was acting.¹¹¹

Three more decisions¹¹² apparently indicate that New York has firmly set its course against allowance of a wife's action for loss of consortium and has disavowed a lower court's "equal rights" theory.¹¹³ Florida also held that, if the common-law rule is to be changed, the Legislature must do it.¹¹⁴ A federal court, on the other hand, decided that Nebraska law allows such a suit.¹¹⁵

Domestic Relations: (c) Parent and Child.—Apparently the baby sitter's lot, like the policeman's, is not a happy one. A California sitter complained that her little charge committed a battery and

¹⁰⁷ Dickson v. Blacker, 253 S.W.2d 728 (Tenn. 1952).

¹⁰⁸ Id. at 730. On the other hand, in Morse v. Jones, 223 La. 212, 65 So.2d 317 (1953), the parking-lot operator was held not responsible where, after business hours, an attendant broke into plaintiff's car, stole it, and wrecked it. This decision also seems sound.

¹⁰⁹ Brandt v. Keller, 413 Ill. 503, 109 N.E.2d 729 (1952). The case involved alleged wilful and wanton negligence by defendant husband, but the rationale would seem equally applicable to ordinary negligence. The movement toward eliminating tort immunity among members of a family group was observed in 1950 Annual Surv. Am. L. 730; 1952 Annual Surv. Am. L. 652, 28 N.Y.U.L. Rev. 715 (1953).

¹¹⁰ Ill. Rev. Stat. c. 68, ¶¶ 1-21 (1951).

¹¹¹ Garnto v. Henson, 88 Ga. App. 320, 76 S.E.2d 636 (1953).

¹¹² Don v. Benjamin M. Knapp, Inc., 281 App. Div. 893, 119 N.Y.S.2d 801 (2d Dep't 1953); Tenebruso v. Cunningham, 115 N.Y.S.2d 322 (Sup. Ct. 1952); Cook v. Synder, 119 N.Y.S.2d 481 (Sup. Ct. 1953).

¹¹³ The theory was expounded in Passalacqua v. Draper, 199 Misc. 827, 104 N.Y.S.2d 973 (Sup. Ct.), rev'd, 279 App. Div. 660, 107 N.Y.S.2d 812 (2d Dep't 1951).

¹¹⁴ Ripley v. Ewell, 61 So.2d 420 (Fla. 1952). See Note, 23 A.L.R.2d 1378 (1952).

¹¹⁵ Cooney v. Moomaw, 109 F. Supp. 448 (D. Neb. 1953). The case, which contains a good collection of authorities on both sides, is noted in 41 Geo. L.J. 443 (1953). One of the few other decisions to this effect is Hitafer v. Argonne, 183 F.2d 811 (D.C. Cir. 1950).

negligently shoved her to the floor, fracturing her arms and wrists.¹¹⁶ The court reasoned that a minor was liable for battery if he had capacity to intend the violent contact, even though he did not appreciate its wrongfulness, and whether the defendant four-year-old had that capacity was for the jury to say. The negligence count was insufficient, however, since as a matter of law a child of such tender years could not foresee the results of his careless conduct.¹¹⁷ A third cause of action, asserting negligence by the parents in failing to warn of the child's known habit of violence was held good.

The case seems correctly decided. As to the parents the complaint was undoubtedly sufficient since, while not liable for the child's torts, they were responsible for their own negligence in failing to warn of dangerous propensities.¹¹⁸ In this respect the practical, if unsentimental, common law puts children and domestic animals in the same category. The decision as to the child's liability also appears proper.

Another California case raised the novel question of a milk company's liability for injuries sustained by a very young child when he fell as he picked up a milk bottle left on the back porch, causing the bottle to break close to his face.¹¹⁹ The complaint alleged that the parents, fearful that otherwise the child would be hurt, had agreed with the company that all bottles should be placed in the refrigerator. The pleading was sustained upon the theory that the child was the third party beneficiary of the contract, and that a cause of action in tort arose from negligent performance of the contractual duty.

Missouri¹²⁰ and Illinois¹²¹ joined the commendable trend toward

¹¹⁶ *Ellis v. D'Angelo*, 253 P.2d 675 (Cal. App. 1953).

¹¹⁷ Whether a seven-year-old child has been contributorily negligent is for the jury. *Ryder v. Robinson*, 329 Mass. 805, 107 N.E.2d 803 (1952). On the question of a mentally defective person's responsibility for contributory negligence see *Noel v. McCaig*, 258 P.2d 234, 240-41 (Kan. 1953).

¹¹⁸ *Mazzilli v. Selger*, 13 N.J. 296, 99 A.2d 417 (1953); *Weakly v. Baxter*, 350 Ill. App. 8, 111 N.E.2d 561 (1952) (recent attempts to show negligence by parents in failing to control children).

The related question whether an adoptive parent is liable for negligent injury to an adopted child inflicted by the adoptive parent prior to the adoption was answered affirmatively in *Adams v. Nadel*, 124 N.Y.S.2d 427 (Sup. Ct. 1953), which viewed that situation as sufficiently distinguishable from unemancipated natural-child cases like *Cannon v. Cannon*, 287 N.Y. 425, 40 N.E.2d 236 (1942), to justify a different result.

¹¹⁹ *Eads v. Marks*, 39 Cal.2d 807, 249 P.2d 257 (1952) (sixteen-month-old child).

¹²⁰ *Steggall v. Morris*, 258 S.W.2d 577 (Mo. 1953). Shortly before, New York reached a similar conclusion in *Woods v. Lancet*, 303 N.Y. 349, 102 N.E.2d 691, 27 A.L.R.2d 1250 (1951), which flatly overruled a precedent to the contrary. *Drobner v. Peters*, 232 N.Y. 220, 133 N.E. 567 (1921). However, as noted in 1952 Annual Surv. Am. L. 642, 28 N.Y.U.L. Rev. 705 (1953), Massachusetts and Nebraska recently adhered to the old rule.

¹²¹ *Amann v. Faigy*, 114 N.E.2d 412 (Ill. 1953) (wrongful death action; child born alive but shortly thereafter died from prenatal injuries). The opinion, an excellent analysis of the entire problem, cites recent decisions of the courts of last resort of New York, Maryland, Georgia, Minnesota and Ohio recognizing the viable child's rights.

recognizing the right of recovery for injury to a child while *en ventre sa mere* if he is subsequently born alive. Most of the recent cases emphasize that the child was viable at the time of the injury, but there would seem to be no reason to deny recovery even if this circumstance were absent. A New York decision has allowed a suit in a case involving a nonviable child.¹²² On the other hand, where the child dies before birth, it is much more difficult to justify allowance of a wrongful death action, and a recent Oklahoma case which denied that right may well be correct.¹²³

Manufacturers and Suppliers of Chattels.—Cases involving the responsibility of manufacturers to ultimate consumers have been mostly of the garden variety. The law has, of course, come a long way from the day when manufacturers were liable for negligence only in the case of articles inherently dangerous to life and limb. One of this year's decisions, for instance, involved the collapse of a bar stool.¹²⁴ One would hardly label that instrumentality as inherently dangerous, however appropriate the appellation might be for the liquids dispensed to those who sit upon it.

Perhaps the most important case was one of first impression in Ohio, which followed a recent New York ruling,¹²⁵ and held that the principles of negligence liability established for manufacturers were applicable also to bailors for hire.¹²⁶

Last year's *Survey* noted that an auto manufacturer was liable to the ultimate purchaser despite the intervening negligence of a new car dealer's inadequate inspection.¹²⁷ A recent decision holds that a prior owner, who sold a truck "as is" to a used car dealer, is not liable to the injured son of the purchaser from the dealer.¹²⁸ The distinction appears well taken. The inadequate inspection is more readily foreseeable in the new car case. Moreover, special policy considerations apply to manufacturers' liability.

Several significant decisions dealt with the statute of limitations. New York held a cause of action for breach of the implied warranty

¹²² Kelly v. Gregory, 282 App. Div. 542, 125 N.Y.S.2d 696 (3d Dep't 1953).

¹²³ Howell v. Rushing, 261 P.2d 217 (Okla. 1953). Cf. Verkennes v. Cornicea, 229 Minn. 365, 38 N.W.2d 838, 10 A.L.R.2d 634 (1949).

¹²⁴ Okker v. Chrome Furniture Mfg. Corp., 26 N.J. Super. 295, 97 A.2d 699 (App. Div. 1953).

¹²⁵ LaRocca v. Farrington, 301 N.Y. 247, 93 N.E.2d 829 (1950). See also DeMaria v. Renee Operating Corp., 282 App. Div. 221, 122 N.Y.S.2d 236 (1st Dep't 1953), making it clear that a supplier, like a manufacturer, may in a proper case be liable for latent defects not ascertainable upon mere visual inspection.

¹²⁶ Scharf v. Gardner Cartage Co., 113 N.E.2d 717 (Ohio App. 1953).

¹²⁷ 1952 Annual Surv. Am. L. 645, 28 N.Y.U.L. Rev. 708 (1953), discussing Pierce v. Ford Motor Co., 190 F.2d 910 (4th Cir.), cert. denied, 342 U.S. 887 (1951).

¹²⁸ Thrash v. U-Drive-It Co., 158 Ohio St. 465, 110 N.E.2d 419 (1953), 39 Va. L. Rev. 387.

of fitness for use subject to the six-year contract limit rather than the three-year negligence period.¹²⁹ Hence the warranty action in that state is still a mixed breed, with tort damages but contractual privity and a contractual limitations period.

Entitled to an award for the worst decision during the period under review is *Dincher v. Marlin Firearms Co.*, decided by the second circuit.¹³⁰ In 1950, plaintiff lost an eye when a rifle, allegedly manufactured by defendant, in a negligent manner, backfired. Defendant sold the rifle in 1946 to a sporting goods company. A cousin of plaintiff bought it in 1949. The applicable Connecticut statute set a limitations period on negligence actions of one year "from the date of the act or omission complained of," and the court held that the statute began to run, at the latest, when the manufacturer sold the gun. Thus plaintiff's claim was barred in 1947, or some three years before it accrued. Judge Frank, dissenting, aptly described the decision as suitable for "topsy-turvy land."¹³¹

Landowners and Occupiers.—Landowners have not escaped the trend toward heavier responsibilities for defendants. Illustrative of their greater burdens is an Ohio holding that a rural landowner, when he learns of a defective tree, must exercise reasonable care to protect those using the adjacent highway, though he has no duty to inspect trees to ascertain defects.¹³² The decision is a good one. There has been an unfortunate reluctance to modify the ancient rule of nonliability for "natural conditions" to accord with modern needs.¹³³ Whatever the merits of the natural conditions rule generally, the modification here seems thoroughly justified.¹³⁴

¹²⁹ *Blessington v. McCrory Stores Corp.*, 305 N.Y. 140, 111 N.E.2d 421 (1953), 28 N.Y.U.L. Rev. 1191. Earlier holdings were to the contrary. *Schlick v. New York Dugan Bros.*, 175 Misc. 182, 22 N.Y.S.2d 238 (City Ct. 1940); *Buyers v. Buffalo Paint & Specialties*, 190 Misc. 764, 99 N.Y.S.2d 713 (Sup. Ct. 1950).

¹³⁰ 198 F.2d 821 (2d Cir. 1952), 28 N.Y.U.L. Rev. 226 (1953), 5 Ala. L. Rev. 332 (1953).

¹³¹ A Note, 31 Tex. L. Rev. 916, 917-18 (1953), states that "unless the Connecticut legislature is certain that the Connecticut Supreme Court will ignore this holding, legislative reform is obviously desirable." Perhaps the best criticism is *Schmidt v. Merchants Despatch Transportation Co.*, 270 N.Y. 287, 300, 200 N.E. 824, 827 (1936): "There can be no doubt that a cause of action accrues only when the forces wrongfully put in motion produce injury. Otherwise, in extreme cases, a cause of action might be barred before liability arose."

¹³² *Hay v. Norwalk Lodge*, 92 Ohio App. 14, 109 N.E.2d 481 (1952). As to an obligation to inspect, compare *Chambers v. Whelen*, 44 F.2d 340 (4th Cir. 1930) with *Brandywine Hundred Realty Co. v. Cutillo*, 55 F.2d 231 (3d Cir. 1931), cert. denied, 285 U.S. 555 (1932).

¹³³ Even the Restatement of Torts straddled the question of the liability for trees near a public highway. Caveat to § 363.

¹³⁴ That the normally innocuous game of golf has unexpected hazards is evident from a decision holding a country club liable when a passenger in an automobile was struck by a misdirected ball. *Westthorough Country Club v. Palmer*, 204 F.2d 143

An unusual but correctly reasoned New Jersey case held legally sufficient a complaint which alleged that defendant, without disclosing her tubercular condition, rented the second floor of her house to plaintiffs with the result that plaintiffs' infant daughter contracted the disease.¹³⁵ Questionable is a Georgia decision dismissing the complaint of one injured while repairing a roof gutter on defendant's dwelling when a banister collapsed because of a hidden defect.¹³⁶ The court concluded that defendant had no duty, in the absence of actual knowledge of a defect, to inspect the apparently safe banister. Most courts would probably have sent that issue to the jury.

Charities.—Despite hopeful indications last year in Alaska, Delaware, and Mississippi,¹³⁷ very recent cases make it doubtful that widespread elimination of charitable immunity is going to come from the courts. Probably the battle in most states will have to be carried to the legislative halls. New York's highest court declined to retreat, despite a lone dissenter's contention that its latest decision was "an unwarranted extension of the immunity rule, which has not escaped criticism in recent years."¹³⁸ New Jersey,¹³⁹ North Carolina,¹⁴⁰ and West Virginia¹⁴¹ also withstood assaults. The West Virginia decision specifically held that the fact that the charity was insured was of no consequence.¹⁴²

Municipal and State Governments.—The hazy and much-criticized distinction between "governmental" and "proprietary" functions continues to be the main criterion of municipal liability. Louisiana ruled that a city was not responsible for defective maintenance of traffic

(8th Cir. 1953) (applying Missouri law). However usual a slice may be, it is by no means a "natural condition" in the law!

¹³⁵ Earle v. Kuklo, 26 N.J. Super. 471, 98 A.2d 107 (App. Div. 1953). Defendant's entire family was infected.

¹³⁶ Howerdd v. Whitaker, 87 Ga. App. 850, 75 S.E.2d 572 (1953); Worrill, J., dissenting.

¹³⁷ See 1952 Annual Surv. Am. L. 649-50, 28 N.Y.U.L. Rev. 712-13 (1953).

¹³⁸ Bryant v. Presbyterian Hospital, 304 N.Y. 538, 544, 110 N.E.2d 391, 394 (1953) (injection of penicillin by one whom plaintiff claimed was an incompetent student nurse).

¹³⁹ Casper v. Cooper Hospital, 26 N.J. Super. 535, 98 A.2d 605 (App. Div. 1953) (registered nurse enrolled as paying member of course given by college in nurses' home of charitable hospital could not recover when she fell on its premises).

¹⁴⁰ Williams v. Randolph Hospital, 237 N.C. 387, 75 S.E.2d 303 (1953) (charitable hospital not liable to paying patient for burns received while under "croup tent"), discussed in 39 Va. L. Rev. 835 (1953).

¹⁴¹ Meade v. St. Francis Hospital of Charleston, 74 S.E.2d 405 (W. Va. 1953) (charitable hospital not liable for death of paying infant patient in nursery).

¹⁴² This is in accord with the majority view though a few decisions have held otherwise. Wendt v. Servite Fathers, 332 Ill. App. 618, 76 N.E.2d 342 (1947); O'Connor v. Boulder Colorado Sanitarium Ass'n, 105 Colo. 259, 96 P.2d 835 (1939), noted in 133 A.L.R. 819 (1941).

lights since traffic regulation is governmental.¹⁴³ That the city was authorized to install parking meters was immaterial. A similar conclusion under Vermont law was reached as to a concrete "silent policeman" used to guide traffic.¹⁴⁴

Praiseworthy is a decision holding a state liable for the death of a man killed without reason by a former inmate of a state mental hospital.¹⁴⁵ Because of crowded conditions the psychiatrists had not followed accepted practices. This courageous decision may help prevent such incidents which in recent years have occurred with distressing frequency.

Federal Government.—The Supreme Court construed the "discretionary function" exception¹⁴⁶ in the Federal Tort Claims Act.¹⁴⁷ Two ships loaded with fertilizer at Texas City, Texas, exploded, leveling much of the city. Two hundred million dollars of claims were filed. The fertilizer's basic ingredient had long been used as a component of explosives, and the fertilizer was manufactured at ammunition plants under a government plan to feed stricken countries. A district court found the Government negligent in drafting the plan, manufacturing the product and policing the loading, but the fifth circuit reversed,¹⁴⁸ and the Supreme Court affirmed the reversal four to three. In the majority's view the decisions deemed culpable by the district court "were all responsibly made at a planning rather than operational level" and fell within the exception for acts of discretion.¹⁴⁹ Moreover, there could be no recovery on a theory of

¹⁴³ *Edwards v. City of Shreveport*, 66 So.2d 373 (La. App. 1953).

¹⁴⁴ *Clain v. City of Burlington*, 202 F.2d 532 (2d Cir. 1953). Judge Frank, dissenting, scored the "harsh, unjust, undemocratic and anachronistic immunity of municipalities from tort liability." *Id.* at 535.

¹⁴⁵ *St. George v. State*, 203 Misc. 340, 118 N.Y.S.2d 596 (Ct. Cl. 1953), 51 Mich. L. Rev. 1097. The New York Court of Claims is not hesitant to impose liability. Other illustrations are *Saari v. State*, 203 Misc. 859, 119 N.Y.S.2d 507 (Ct. Cl.), *aff'd*, 15 Law Rep. News No. 7, p. 1 (1953) (failure to patrol auto racing course on public highway to protect spectators); *Serbalik v. State*, 204 Misc. 2, 123 N.Y.S.2d 212 (Ct. Cl. 1953) (defective swing in park). See generally Comment, *Tort Claims Against the State of Illinois and its Subdivisions*, 47 N.U.L. Rev. 914 (1953).

¹⁴⁶ 28 U.S.C. § 2680 (Supp. 1952): "The provisions of this chapter . . . shall not apply to—(a) Any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." This exception was also applied in *Smart v. United States*, 111 F. Supp. 907 (W.D. Okla. 1953) (plaintiff allegedly struck by an automobile driven by a mental patient released from a veterans' hospital for a trial visit home), and played some part in *Mid-Central Fish Co. v. United States*, 112 F. Supp. 792 (W.D. Mo. 1953) (plaintiff unsuccessful in suit for damages caused by flood waters at a time when he was allegedly lulled into false security by United States weather reports).

¹⁴⁷ *Dalehite v. United States*, 346 U.S. 15 (1953).

¹⁴⁸ *In re Texas City Disaster Litigation*, 197 F.2d 771 (5th Cir. 1952). See also Note, 66 Harv. L. Rev. 488 (1953).

¹⁴⁹ *Dalehite v. United States*, 346 U.S. 15, 42 (1953).

absolute liability because the Tort Claims Act requires "some brand of misfeasance or nonfeasance."¹⁵⁰

In a forceful dissent, which has much to commend it, Mr. Justice Jackson, joined by Justices Black and Frankfurter, urged that the Tort Claims Act was "meant to embrace more than traffic accidents" for, "If not, the ancient and discredited doctrine that 'The King can do no wrong' has not been uprooted; it has merely been amended to read, 'The King can do only little wrongs.'"¹⁵¹ To the dissenters the negligence was not in governmental policy decisions, but in actions akin to those of a private manufacturer or shipper, and the ordinary rules governing liability of manufacturers and suppliers applied.¹⁵² The dissenters noted also that, while the influence of the Federal Government until recently has been exerted to tighten liability and liberalize remedies, "one of the unanticipated consequences of the Tort Claims Act has been to throw the weight of government influence on the side of lax standards of care."¹⁵³ There is certainly some merit in this observation which is disquieting indeed.

The difficulty of passing judgment on the Texas City decision is not lessened by the ambiguity and inadequacy of the statute's "discretionary function" test. Almost every action, even the driving of an automobile, involves some discretion of which an accident is but an abuse. Obviously Congress had in mind high level policy decisions of a quasi-legislative nature, but any more precise meaning will have to be hammered out painfully case by case.

Also of importance was a decision that the United States, when sued for the negligent operation of a government vehicle, could not implead its employee as a third party defendant.¹⁵⁴ While recognizing that a private employer could do so, the court felt that the rationale

¹⁵⁰ Id. at 45. The statute refers to a "negligent or wrongful" act. 28 U.S.C. § 1346(b) (Supp. 1952).

¹⁵¹ *Dalehite v. United States*, 346 U.S. 15, 60 (1953).

¹⁵² "... a policy adopted in the exercise of an immune discretion was carried out carelessly by those in charge of detail." Id. at 58.

¹⁵³ Id. at 50. Though not involving the discretionary function exception, a somewhat analogous case is *Union Trust Co. v. United States*, 113 F. Supp. 80 (D.D.C. 1953), where the Government was held answerable for the death of passengers in a plane through negligence of control tower personnel at Washington National airport. The court rejected the contention that, since the function was purely governmental, there could be no liability, stating that "the technical niceties hitherto drawn between what are governmental and other functions are rapidly being done away with in an age in which the activities of the Government impinge so manifoldly upon the individual citizen. . . ." Id. at 84.

¹⁵⁴ *Gilman v. United States*, 206 F.2d 846 (9th Cir. 1953).

of the indemnity rule had no application to a government employee.¹⁵⁵ The validity of the distinction may be open to question. There is at least some force in the dissenting judge's observation:

... much of the litigation under the Tort Claims Act arises while the employee, in the course of his employment, is using a privately owned automobile fully covered by insurance. The ruling of the majority permits such insurance carriers to escape liability at the expense of the government. . . .

... to permit an employee of the government to escape liability for his tort is to place a premium on negligence and encourage collusion between the employee and the claimant.¹⁵⁶

It has been decided that a member of the District of Columbia national guard during peacetime training is an "employee of the Government" within the Tort Claims Act.¹⁵⁷ While this holding differs from decisions concerning the guards of states,¹⁵⁸ it is not inconsistent with them. The District's guard is unique because of the federal control and presidential command to which it is always subject.

Other important cases were to the effect that a prisoner could not sue the United States for injuries sustained in a federal reformatory,¹⁵⁹ and that insurance companies, as subrogees of claims for property losses sustained by air force personnel and their families when a bomber crashed near an air force housing establishment, could not recover from the Government.¹⁶⁰ The latter holding reasoned that the losses were incident to military service and compensable, if at all, only under the Military Personnel Claims Act.¹⁶¹

¹⁵⁵ In this connection the court cited 28 U.S.C. § 2676 (Supp. 1952): "The judgment in an action under Section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim."

¹⁵⁶ *Gilman v. United States*, 206 F.2d 846, 850 (9th Cir. 1953).

¹⁵⁷ *O'Toole v. United States*, 206 F.2d 912 (3d Cir. 1953). The definition of an "employee" is in 28 U.S.C. § 2671 (Supp. 1952).

¹⁵⁸ *Williams v. United States*, 189 F.2d 607 (10th Cir. 1951); *Glasgow v. United States*, 95 F. Supp. 213 (N.D. Ala. 1951); *Satcher v. United States*, 101 F. Supp. 919 (W.D.S.C. 1952). National guard unit "caretakers" have, however, usually been regarded as government employees. *Elmo v. United States*, 197 F.2d 230 (5th Cir. 1952); *United States v. Duncan*, 197 F.2d 233 (5th Cir. 1952); *United States v. Holly*, 192 F.2d 221 (10th Cir. 1951). See *McNiece & Thornton, The Federal Tort Claims Act and Its Application to Military Personnel*, 5 Vand. L. Rev. 57 (1951); *Rose, The National Guard and the Federal Tort Claims Act*, 6 Vand. L. Rev. 370 (1953).

¹⁵⁹ *Sigmon v. United States*, 110 F. Supp. 906 (W.D. Va. 1953).

¹⁶⁰ *Fidelity-Phenix Fire Ins. Co. v. United States*, 111 F. Supp. 899 (N.D. Cal. 1953).

¹⁶¹ 59 Stat. 225 (1945), 31 U.S.C. § 222c (1946). Since regulations promulgated under this Act prohibited the reimbursement of insurers, plaintiffs were left without a remedy. *Feres v. United States*, 340 U.S. 135 (1950) is the leading case for the principle that suits by servicemen for injuries incident to their service are not maintainable under the Tort Claims Act.

V

WORKMEN'S COMPENSATION

Space limitations forbid any thorough canvass of the compensation field, but a few leading holdings may be mentioned. To be compensable an accident must, in most states, arise "out of" and "in the course of" employment, or, as in a few, simply "in the course of" employment. This compensation formula is by no means as strict as the tort test of an employment relation,¹⁶² as recent cases again demonstrate. North Dakota held compensable the injury of a waitress shot by a customer for some unknown reason;¹⁶³ Mississippi, following the prevailing view, allowed recovery in a "horseplay" case of first impression in that state;¹⁶⁴ and Washington, in line with the authorities, permitted benefits where decedent, after a hand injury, developed a manic-depressive psychosis and killed himself.¹⁶⁵

Evidentiary requirements are also less strict than in common-law suits. Courts and administrative agencies, impressed with the social purposes of compensation acts, strive wherever possible to bring claimants within their coverage. New Hampshire, for example, sustained an award of death benefits where there were no eyewitnesses to the accident and the medical testimony supporting the finding of causal connection between the employment and the injury was at variance with generally accepted medical views.¹⁶⁶ Florida did likewise when a decedent, who had been entertaining a customer all evening, was frightened by two men in a parked car and killed as he drove his car at high speed in an apparent attempt to escape.¹⁶⁷

An important decision marking the boundaries between state and federal jurisdiction held that, when a railroad participated in state workmen's compensation proceedings and paid three awards to a claimant, it could not thereafter challenge the state's jurisdiction on the ground that the claimant was employed in interstate commerce and the Federal Employers' Liability Act was the exclusive remedy.¹⁶⁸

¹⁶² While this is not the place to deal with the question, it may be noted that developments in the workmen's compensation formula have had much to do with the trend toward an increasingly broad interpretation of the employment relation in tort cases.

¹⁶³ *Lippmann v. North Dakota Workmen's Comp. Bureau*, 55 N.W.2d 453 (N.D. 1952).

¹⁶⁴ *Joe N. Miles & Sons v. Myatt*, 215 Miss. 589, 61 So.2d 390 (1952).

¹⁶⁵ *Karlen v. Department of Labor and Industries*, 41 Wash.2d 301, 249 P.2d 364 (1952), rehearing denied, 41 Wash.2d 301, 249 P.2d 364 (1953).

¹⁶⁶ *Bohan v. Lord & Keanan, Inc.*, 95 A.2d 786 (N.H. 1953).

¹⁶⁷ *American Airmotive Corp. v. Moore*, 62 So.2d 37 (Fla. 1952).

¹⁶⁸ *South Buffalo Ry. v. Ahern*, 344 U.S. 367 (1953). A thorough study of the Federal Employers' Liability Act is contained in a symposium on that subject in 18 *Law & Contemp. Prob.* 107-431 (1953).

The holding appears sound. While whittling away of federal rights should not be encouraged, the circumstances fairly showed an agreement by the railroad to waive such rights, and no strong policy precludes such a waiver.¹⁶⁹

VI

LITERATURE

In one of the best articles of the year Professor Jaffe good-naturedly took to task Professor James and the present authors for stressing problems of liability rather than "the crucial controversy" of damages.¹⁷⁰ As fault gives way to insurability as the premise of liability in American law,¹⁷¹ Professor Jaffe argues with much force that a re-evaluation of the kinds of injuries which are compensated and their degree of compensation is in order. He suggests, for instance, that it may not be proper under newer standards to award compensation for pain, particularly that already suffered.¹⁷²

Dean Prosser has done the impossible by writing something *new* about the *Palsgraf* case.¹⁷³ He doubts "that all the manifold theories of the professors really have improved at all upon the old words 'proximate' and 'remote,' with the idea they convey of some reasonable connection between the original negligence and its consequences. . . ."¹⁷⁴ Professor James, on the other hand, in an equally penetrating study, opines that a proximate cause analysis "prevents clarity of thought and meaningful analysis."¹⁷⁵

¹⁶⁹ The statute involved was N.Y. Workmen's Comp. Law § 113, which provides that awards may be made by the state board "in respect of injuries subject to the admiralty or other federal laws in case the claimant, the employer and the insurance carrier waive their admiralty or interstate commerce rights and remedies."

¹⁷⁰ Damages for Personal Injury: The Impact of Insurance, 18 Law & Contemp. Prob. 219 (1953).

¹⁷¹ Interestingly enough, the tendency of recent English decisions seems to be away from the expansion of liability and back toward the identification of responsibility with "fault." A well-considered article suggested that the spread of social welfare legislation and the imposition of strict liability by statute and regulation has caused the English courts to feel that it is now unnecessary for the common law to stray beyond the bounds of fault. Griffith, "Fault" Triumphant, 28 N.Y.U.L. Rev. 1069 (1953). It may also be significant that Lord Goddard's committee has suggested that even the rule of strict liability for wild animals should be changed to make responsibility depend upon negligence. Report of the Goddard Committee on the Law of Civil Liability for Damage Done by Animals, 16 Mod. L. Rev. 497 (1953).

¹⁷² Pain is, of course, sometimes the principal element of damages, as in *Harris v. Breezy Point Lodge*, 56 N.W.2d 655 (Minn. 1953), where, despite the fact that special damages were less than one-fourth that sum, a \$28,000 verdict was sustained. It was also a big element in the \$250,000 award in *Kieffer v. Blue Seal Chemical Co.*, 107 F. Supp. 288 (D.N.J. 1952).

¹⁷³ *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928).

¹⁷⁴ Prosser, *Palsgraf Revisited*, 52 Mich. L. Rev. 1, 32 (1953). Another valuable work by the same author is *Comparative Negligence*, 51 Mich. L. Rev. 465 (1953).

¹⁷⁵ James, *Scope of Duty in Negligence Cases*, 47 N.U.L. Rev. 778, 815 (1953).

Professor Green, commenting on a recent book¹⁷⁶ and the series of articles published in honor of the late Professor Kaufman,¹⁷⁷ suggests that the "impotency" of the judicial process in personal injury cases can only be removed by eliminating theories of liability and by limiting the inquiry to the single issue of the best arrangement that can be made for the victim.¹⁷⁸ Professor Ehrenzweig leans in the same direction in a recent article in which he strives to uncover psychological pressures which account for the persistence of the "fault" idea in American law.¹⁷⁹ Of the other articles, a few are noted in a footnote.¹⁸⁰

This article and the following two other recent ones by the same writer are particularly useful for teaching purposes. *Nature of Negligence*, 3 *Utah L. Rev.* 275 (1953); *Contributory Negligence*, 62 *Yale L.J.* 691 (1953).

¹⁷⁶ Ehrenzweig, *Negligence Without Fault* (1951). Professor Appelman's vehement criticism of the volume, to which the present authors do not subscribe, appears in 47 *N.U.L. Rev.* 933 (1953).

¹⁷⁷ James, *Social Insurance and Tort Liability: The Problem of Alternative Remedies*, 27 *N.Y.U.L. Rev.* 537 (1952); Leflar, *Negligence in Name Only*, 27 *id.* at 564; McNiece & Thornton, *Automobile Accident Prevention and Compensation*, 27 *id.* at 585; Feezer, *A Circle Tour through Negligence*, 27 *id.* at 647.

¹⁷⁸ Green, *The Individual's Protection under Negligence Law: Risk Sharing*, 47 *N.U.L. Rev.* 751, 776 (1953). This "impotency" of which Professor Green speaks is in part attributable to the bar itself. Comment, *Settlement of Personal Injury Cases in the Chicago Area*, 47 *N.U.L. Rev.* 895 (1953), points out the deplorable fact that "almost all" serious personal injury claims are ambulance-chased and over half are actually handled by chasers. Another problem is calendar congestion which exists to a tremendous extent in urban areas such as Chicago and New York, so much so that the chief judge of the New York Court of Appeals regards it as a threat to the law profession's continued existence. *Clear Court Backlog or Look for New Jobs*, *Brooklyn Eagle*, Dec. 4, 1953, p. 4, col. 1. See also *Symposium on Automobile Accident Problems and Proposed Legislation*, 25 *N.Y. State Bar Bull.* 295 (1953); *Calendar Status Study*, *Inst. of Jud. Admin.* (June 30, 1953).

¹⁷⁹ Ehrenzweig, *A Psychoanalysis of Negligence*, 47 *N.U.L. Rev.* 855 (1953). While this article is thought-provoking, Professor Ehrenzweig appears to be on firmer ground when outside the mazes of psychology, as in his yet unpublished *Liability Without Fault and the Adjustment of Automobile Losses*, prepared for the Robert S. Marx Seminar at the College of Law, University of Cincinnati, November 1952, which he has made available to the present writers.

¹⁸⁰ Leflar, *The Single Publication Rule*, 25 *Rocky Mt. L. Rev.* 263 (1953); Harper, *Interference with Contractual Relations*, 47 *N.U.L. Rev.* 873 (1953); Morris, *Proof of Negligence*, 47 *N.U.L. Rev.* 817 (1953). See also the book reviews of Morris, *Studies in the Law of Torts* (1952), by Wade in 47 *N.U.L. Rev.* 935 (1953); Smith & Prosser, *Cases and Materials on Torts* (1952), by McNiece in [1953] *Wash. U.L.Q.* 229.

FAMILY LAW

FRANK R. LACY, JR.

CURRENT fashion in writing and discussion of family law problems stresses anthropology, psychology and sociology. Pleas are made for an "interdisciplinary approach" and for the increased use of nonlegal materials.¹ Not intending in the least to belittle the social problem these people are seeking to remedy, this writer is of the opinion that it is not a problem for the lawyer qua lawyer. A convincing argument can be made that to base divorce law on the notion of "fault" is unrealistic. The lawyer as a citizen or amateur sociologist may agitate for reform; as a lawyer he is concerned with proof of adultery² and setting up or meeting the recrimination defense.³ Dissolution of the marital status may become a matter of registration of mutual consent or unilateral desire; there will remain legal problems of division of property and recovery,⁴ modification⁵ and enforcement of maintenance awards. The present article is concerned with such crass matters.

I

MATRIMONIAL ACTIONS

Generally.—Several cases turned on the effects or appropriateness under given circumstances of different kinds of proceedings.

In *Martin v. Martin*⁶ *W* had gotten a Connecticut separate maintenance decree because *H* had left her without justification. *H* sought to effect a reconciliation but *W* refused. *H* set up this refusal as desertion and obtained an absolute divorce. The decree was reversed on an evidence point but the court agreed that a wife's rights "based simply on the fact of desertion" can be terminated by a good faith offer to reconcile, distinguishing cases of limited divorce where the parties are forbidden to live together while the decree remains in force and where an exclusive method of abrogating the decree on motion is provided.

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¹ Harper, *Problems of the Family* (1952); Mariano, *A Psychoanalytic Lawyer Looks at Marriage and Divorce* (1952); Rosenheim, *The Use of Non-Legal Materials in Family Law*, 6 J. Legal Educ. 79 (1953).

² See p. 566 *infra*.

³ *Ibid*.

⁴ *Ibid*.

⁵ See p. 572 *infra*.

⁶ 66 So.2d 268 (Fla. 1953).

By desertion the court presumably meant failure to support. If the grounds for the maintenance decree are a real abandonment, adultery, cruelty or the like, *H* should not be able to demand a reconciliation no matter what the *form* of proceeding.

*Justice v. Justice*⁷ involved a decree for alimony without divorce. Here the parties had resumed cohabitation briefly and then separated again. The question was whether *H* could have the decree avoided. The court held that a decree of this kind remains in effect until annulled on motion, that a unilateral motion will be granted if it appears that *H* and *W* have agreed to "cancel the order" or that there has been a bona fide reconciliation, but that resumption of cohabitation is not conclusive evidence of reconciliation.⁸

*Cecil v. Farmer's National Bank*⁹ involved an informal reconciliation and resumption of cohabitation after a limited divorce. By an agreement incorporated in the decree *W* had accepted \$2,000 in full settlement of her share in *H*'s estate. It was held that although the limited divorce decree had never been abrogated *W* was entitled to dower if she established that there had been a rescission of the agreement by mutual consent.¹⁰

Attention was drawn in last year's *Survey* to an Ohio case¹¹ holding that divorce was the exclusive remedy in case of a marriage void because bigamous, the reason being that justice may demand recognition of property interests and rights to support even though the marriage is a legal nullity and alimony cannot be granted in annulment suits. *Cessat ratio, cessat lex*. This year an inferior Ohio court held that annulment was a proper remedy for a bigamous marriage in a case where there had never been any cohabitation and the parties could have no possible pecuniary claims against each other.¹²

In Ohio a marriage of an uncle and a niece is void ab initio. However this is not made a ground for divorce. *Basickas v. Basickas*¹³ affirmed a divorce granted in such a case on the ground of "fraudulent contract." The court recognized neither party had imposed upon the other but held that the statutory phrase covered the fraud perpetrated by both parties on the probate court in obtaining a marriage license. It does not appear that the case involved an alimony award but pre-

⁷ 108 N.E.2d 874 (Ohio 1952).

⁸ Cf. *Kinley v. Kinley*, 115 N.Y.S.2d 341 (Sup. Ct. 1952) (single act of intercourse not conclusive evidence of condonation). This case was noted in 28 N.Y.U.L. Rev. 1047 (1953).

⁹ 245 S.W.2d 430 (Ky. 1952), 41 Ky. L.J. 468 (1953).

¹⁰ Cf. *Hafner v. Hafner*, 54 N.W.2d 854 (Minn. 1952).

¹¹ *Eggleston v. Eggleston*, 156 Ohio St. 422, 103 N.E.2d 395 (1952), 1952 Annual Surv. Am. L. 675, 28 N.Y.U.L. Rev. 738 (1953); 4 W. Res. L. Rev. 75, 225 (1952).

¹² *Nyhuis v. Pierce*, 114 N.E.2d 75 (Ohio App. 1952).

¹³ 93 Ohio App. 531, 114 N.E.2d 270 (1953).

sumably the way is now paved for such in line with the view taken in the bigamy cases.

Grounds.—Two cases involved attempts by husbands to prove adultery by showing that they were not the fathers of children born to their wives.¹⁴ In each they were barred by the presumption of legitimacy. These cases seem wrong. Legitimacy is a legal status, not a matter of fact. There is no reason why proof of a child's factual parentage need affect his name and rights of inheritance.¹⁵

Defenses.—*De Burgh v. De Burgh*¹⁶ was by all odds the case of the year in the family law field. It has been commented on so widely that it will suffice to observe that by a judicial *tour de force* the Supreme Court of California abolished the statutory defense of recrimination in that state. Although it is impossible to go along with the statutory construction by which the majority reached this result one applauds the case both from the standpoint of sociology and of jurisprudence. As to the former, the recrimination defense is simply indefensible. As to the latter, the law must move and in much of the private-law field this means that judges must legislate. Here legislatures have neither inclination nor ability to act. Perhaps the best solution is a law revision commission to inspire and counsel the legislature in matters of technical private law. At present it seems entirely proper for the courts to overhaul the law, if necessary by means of casuistry where an anachronistic rule is enshrined in a statute.

II

ALIMENTARY DUTIES

Extent of Duty to Support Wife.—In *McGuire v. McGuire*¹⁷ it appeared that defendant husband, although in the winter of life, without other dependents or obligations and worth some \$200,000, had required his companion of a lifetime to live in a house without inside plumbing, to work with him in the fields and to provide her clothing and their food by selling poultry and eggs. A decree requiring him to modernize the house, buy a new car and give his wife a fifty-dollar monthly allowance was reversed. The Nebraska court found abundant authority that a mistreated wife may without seeking a divorce compel her husband to support her, living apart from him, in accordance with

¹⁴ *Feazel v. Feazel*, 222 La. 113, 62 So.2d 119 (1952) (H and W both testified they had never had intercourse, child born one year after cohabitation terminated); *Parsons v. Parsons*, 253 P.2d 914 (Ore. 1953) (H's motion for blood tests denied, W granted divorce for H's unfounded accusations of adultery).

¹⁵ Cf. *Sayles v. Sayles*, 323 Mass. 66, 80 N.E.2d 21 (1948).

¹⁶ 39 Cal.2d 858, 250 P.2d 598 (1952), 33 B.U.L. Rev. 239 (1953), 41 Calif. L. Rev. 320 (1953), 31 Chi-Kent Rev. 368 (1953), 4 Hastings L.J. 197, 199 (1953), 5 Stan. L. Rev. 540 (1953).

¹⁷ 157 Neb. 226, 59 N.W.2d 336 (1953).

his means but concluded that, "As long as the home is maintained and the parties are living as husband and wife it may be said that the husband is legally supporting his wife and the purpose of the marriage relation is being carried out."

A lone dissenting justice argued as follows. Nebraska courts award alimony without divorce independently of any statutory authority. They are constrained to do so because the promarriage policy of the law will not countenance a rule that a wife must seek a divorce in order to obtain support; by a parity of reasoning they should not require her to leave her husband's home to obtain support.¹⁸ The majority ignored these arguments, apparently conceiving the husband's duty as limited to providing the bare essentials of existence. Perhaps the disruptive tendency of litigation between spouses¹⁹ and the husband's responsibility for the long-run material well being of his family²⁰ justifies denial of remedies to a wife who remains with a husband who refuses to support her in the manner in which she or a court may think he is capable.

In *Modell v. Modell*²¹ *W* had obtained a separate maintenance decree awarding her certain insurance policies and ordering *H* to keep them in force. The appellate court held that since *H*'s duty to support his wife ends with his death he could not properly be compelled to create a fund for her support after his death.²² What if the weekly allowance, also included in the decree, had been increased by an amount sufficient to enable her to pay the premiums? The New Jersey statute provides that "suitable support" should be decreed and this apparently means that a separated wife should be put in about the same economic position as she would have enjoyed but for the separation.²³ Is it unreasonable to regard provision for future security as part of a person's present economic position? If an increased allowance might have been affirmed on this basis the present decree seems unobjectionable. The effect on the husband is the same and there is

¹⁸ 59 N.W.2d at 342. The dissenting justice would have affirmed the decree only in so far as it awarded a monthly allowance.

¹⁹ Cf. *Clement v. Atlantic Cas. Ins. Co.*, 25 N.J. Super. 96, 95 A.2d 494 (Law Div. 1953) (*W* recovered from *H*'s liability insurer; since *H* not real party in interest policy against "public appearance of marital disharmony" not involved). Readily distinguishable are cases where temporary alimony is granted to a wife who continues to live with her husband pending suit. *Englund v. Englund*, 92 Ohio App. 527, 110 N.E.2d 35 (1952).

²⁰ See Madden, *Persons and Domestic Relations* 195 (1931).

²¹ 23 N.J. Super. 60, 92 A.2d 505 (App. Div. 1952).

²² *Accord*, *Foster v. Foster*, 77 S.E.2d 471 (Va. 1953). The estate of a deceased father was charged with support of his minor child in *Morris v. Henry*, 193 Va. 631, 70 S.E.2d 417 (1952), 26 Temp. L.Q. 202, 203, 38 Va. L. Rev. 831. Of course *H* may contract to keep in force insurance in favor of ex-*W*. *Hundertmark v. Hundertmark*, 372 Pa. 138, 93 A.2d 856 (1952). Cf. *In re Lewis' Will*, 123 N.Y.S.2d 859 (Surr. Ct. 1953).

²³ N.J. Stat. Ann. § 2:50-39 (1939); *Adams v. Adams*, 17 N.J. Misc. 234, 8 A.2d 214 (Ch. Ct. 1939).

assurance that the money will be used for the purpose for which it was awarded.²⁴

*Sutton v. Leib*²⁵ considered the effect of *W*'s void remarriage on *H*'s duty to support her. The court recognized the policy that a woman should not simultaneously be entitled to support from two men but held that since *W*'s second marriage was void rather than voidable she was never entitled to support from *H-2* and the fact that he gratuitously supported her must be disregarded in considering *H*'s obligations. This seems questionable.

Divisible Divorce.—Many states have held, in line with *Estin v. Estin*,²⁶ that a support award is not affected by a subsequent *ex parte* divorce.²⁷ This year the District of Columbia Court of Appeals, in *Meredith v. Meredith*,²⁸ refused to express an opinion on that point but held that a wife's suit in the District for separate maintenance was properly dismissed when her husband obtained an *ex parte* Texas divorce. The court argued that while in view of the *Estin* case an original award of alimony might constitutionally be made after a foreign *ex parte* divorce, such action was not required by that case and was precluded by the District of Columbia code which authorizes an award only to a "wife."²⁹ There was a faint suggestion that the wife might obtain relief by suit in equity.³⁰

In *Dimon v. Dimon*³¹ *W* obtained an *ex parte* Connecticut divorce and then in California sued in equity for alimony. The court held that the code provides for alimony awards only in connection with divorce and that the code remedy is exclusive. A few months later an inferior California court followed *Estin v. Estin* in a case involving a support award predating an *ex parte* divorce.³² The *Dimon* case was not cited.

In most states wives can, by some mode of procedure, compel their husbands to support them after divorce. Since there can scarcely be a remedy without a right a wife must have a cause of action for such support. Assuming that these divisible divorce cases correctly applied local law, the question remains what rationale can support a distinction, with respect to surviving *ex parte* attack, between a personal judgment and the personal cause of action on which such judgment is based? To say that a statute allows alimony to be awarded only to a

²⁴ Cf. *Burr v. Burr*, 207 Okla. 357, 249 P.2d 722 (1952) (decree ordered attorney's fees paid directly to counsel).

²⁵ 199 F.2d 163 (7th Cir. 1952), 26 So. Calif. L. Rev. 448 (1953).

²⁶ 334 U.S. 541 (1948).

²⁷ See Note, 28 A.L.R.2d 1346 (1953).

²⁸ 204 F.2d 64 (D.C. Cir. 1953).

²⁹ A common construction. See Note, 28 A.L.R.2d 1378 (1953).

³⁰ *Meredith v. Meredith*, 204 F.2d 64, 67 n.8 (D.C. Cir. 1953).

³¹ 40 Cal.2d 516, 254 P.2d 528 (1953).

³² *Worthley v. Worthley*, 258 P.2d 588 (Cal. App. 1953).

"wife" describes the rule but does not explain it. Nor does it help to say that the right to alimony is "an incident of the status." If this means that the right terminates with the status how can one account for awards of permanent alimony in suits for absolute divorce; if it means that the right is born of the status it does not follow that it may be enforced only while the status subsists. Whether or not a man should be compelled to support his ex-wife is a difficult moral, sociological and economic problem. The problem is the same whether she has recovered a support award before divorce, applies for one in a divorce suit or applies after divorce.³³

This view was taken by the 1953 New York Legislature. New York, the state of the *Estin* case, had followed the rule of the *Meredith* case.³⁴ The new enactment authorizes the courts to make an original award of alimony to a wife whose husband has previously obtained a divorce "in an action in which jurisdiction over the person of the wife was not obtained."³⁵

The New York legislation does not cover the case where a wife obtains a divorce. A concurring opinion in *Dimon v. Dimon* likewise took the view that while the wife should be protected where the husband obtains an *ex parte* divorce, she waives her rights when she obtains the divorce. In answer to this a dissenting judge argued that a wife should not be compelled to choose between divorcing her husband at home, thus losing her right to support, and establishing a residence in the state to which he has fled (hoping, I might add, that he will stay put while she does so). The concurring judge pointed out that she need not establish residence in California to obtain a support decree there, but it is not clear whether he meant such a decree would survive an *ex parte* divorce subsequently obtained by her. If it would survive, his argument that the wife should not be allowed to try her action piecemeal is meaningless; if she is to be allowed to obtain a divorce and alimony by successive suits in different states it is difficult to see why the order in which the suits are brought should matter. If it would not survive she is in the dilemma posed by the dissenting judge.

One point made by the concurring judge has a good deal of force. At some point—he would say when the divorce becomes final—the parties should be able to regard the marriage as finally wound up and to face the future free from the threat of recurring litigation. The

³³ Cf. *Johnson v. Johnson*, 98 A.2d 276 (Md. 1953) (concurring opinion).

³⁴ *McKendry v. McKendry*, 280 App. Div. 440, 114 N.Y.S.2d 101 (4th Dep't 1952); *Harris v. Harris*, 279 App. Div. 542, 110 N.Y.S.2d 824 (4th Dep't 1952). A like rule followed in the Domestic Relations Court, *Adler v. Adler*, 192 Misc. 953, 81 N.Y.S.2d 797 (Dom. Rel. Ct. 1948) is evidently not affected by N.Y. Civ. Prac. Act § 1170-b.

³⁵ N.Y. Laws 1953, c. 663, N.Y. Civ. Prac. Act § 1170-b. Passage urged by 1953 Law Revision Comm'n Rep., Leg. Doc. (1953) No. 65(K).

husband's peace of mind is bought too dearly at the price of immediate destruction of the wife's right to support, but there is an obvious compromise. A Kansas statute provides that "all matters relating to alimony, and to the property rights of the parties" may be determined "in any proper action or proceeding" brought within two years after a husband obtains an *ex parte* divorce.³⁶ A similar provision, perhaps with a shorter time limitation, could be made for suit after a divorce obtained by a wife.

Effect of Support Decree on Underlying Duty.—It was argued in the preceding section that an alimony or maintenance decree necessarily recognizes and enforces a duty to support. Several cases during the year raise questions as to the effect of a decree on duty by way of merger or bar.

*Roskein v. Roskein*³⁷ was a suit in New Jersey to increase a Nevada child support award. *Scholla v. Scholla*³⁸ involved a District of Columbia child support suit brought after a Florida decree for such support had been obtained against the father. Each court treated the problem as one of res judicata and inquired whether the children were parties to the earlier actions.

In the *Scholla* case it was held that the children had been parties to the Florida suit, apparently because they had been there at the time, and that their sole remedy was an action on the Florida decree. A dissenting justice agreed that the children had been parties but argued that each state in which a father and children reside imposes on him a duty to support them and that the Florida decree merged only the Florida duty. The American Law Institute supports his view as to the separate local existence of the duty to support.³⁹ But although the result reached by the majority is not required as a matter of res judicata it may be supported as promoting efficient administration of justice. Unless the relief obtainable by suit on the foreign decree differs substantially⁴⁰ from what could be obtained by suit on the local duty, a state may well provide that the local duty is unenforceable while there subsists a judgment obtained on the duty imposed by another state. Perhaps it should make a difference in the instant case

³⁶ Kan. Gen. Stat. § 60-1518 (1949); *Fincham v. Fincham*, 174 Kan. 199, 255 P.2d 1018 (1953) (suit for divorce is "proper action or proceeding").

³⁷ 25 N.J. Super. 415, 96 A.2d 437 (Ch. Div. 1953).

³⁸ 201 F.2d 211 (D.C. Cir. 1953), 41 Geo. L.J. 439, 66 Harv. L. Rev. 1132.

³⁹ Restatement, Conflict of Laws §§ 457, 458 (1934).

⁴⁰ Compare *Greenspan v. Slate*, 22 N.J. Super. 344, 92 A.2d 47 (App. Div. 1952), 16 U. of Detroit L.J. 206 (1953), 14 U. of Pitt. L. Rev. 619 (1953) (great difficulty in finding any duty to support child), *rev'd*, 12 N.J. 426, 97 A.2d 390 (1953), with *Commonwealth v. Groff*, 173 Pa. Super. 535, 98 A.2d 449 (1953) (father required to support twenty-two-year old irresponsible, though healthy and legally competent, daughter).

that a foreign decree may not be established as a District of Columbia decree or otherwise enforced by equitable process.

Another problem is involved when successive actions are brought in the same state but by different parties. In *De Marzo v. Vena*⁴¹ and *Mahaney v. Crocker*⁴² actions were brought to recover, respectively, the expenses of a wife's last illness and funeral and the fee for a child's appendectomy. In the former the defendant husband had previously obtained a decree that he was justifiably living apart from his wife. This decree contained no support order. In the latter the defendant father was paying fifteen dollars a week for support of the child under a divorce decree that awarded custody to the mother. In each case it was held that the decree had extinguished the common-law duty to support. As to how these decrees could affect the rights of the present plaintiffs the *De Marzo* case answers that a Massachusetts "living apart" decree so radically affects the incidents of the marriage that it can be regarded as an adjudication in rem; the *Mahaney* case advances the theory that the award of custody to the mother deprived the father of the services and earnings of his child and thus of the consideration for his obligation to support. A more satisfactory explanation of both *Mahaney* and *De Marzo* is that a tradesman's cause of action depends on the existence of the wife's or child's right to support and that this obligation had merged in or been barred by an adjudication.⁴³

*Barrow v. State*⁴⁴ was a criminal prosecution for abandoning minor children, i.e., wilful failure to provide adequate support. At the time of their divorce defendant and his wife had agreed she was to have certain property "in lieu of all alimony or support" for herself and the children. The divorce decree did not incorporate or allude to this agreement but awarded custody to the wife and made no provision for support. A conviction was sustained. The court argued that the award of custody to the wife did not relieve defendant of his primary obligation to support the children; that the agreement between defendant and wife did not bind the children or the state; and that it was immaterial whether the property given the wife was adequate for the support of the children because it was given *in lieu of* rather than *for* support, i.e., defendant was not discharging his duty to support but buying immunity from it.

The first of these points contradicts the view of the Maine court

⁴¹ 111 N.E.2d 797 (Mass. 1953).

⁴² 149 Me. 76, 98 A.2d 728 (1953).

⁴³ The opposite view, that W reimburses herself for money spent on necessities by subrogation to the tradesman's cause of action, is presented in 13 Md. L. Rev. 253 (1953), 26 Temp. L.Q. 459 (1953).

⁴⁴ 87 Ga. App. 572, 74 S.E.2d 467 (1953).

in *Mahaney v. Crocker* and is the better rule. If a custody decree ends the duty to support it is because it involves an adjudication thereof and not because it deprives the father of the child's services. The second argument overlooks the fact that the agreement was evidently brought to the trial court's attention. The state is a "party" to a divorce action not only because of its concern for the marriage as the bulwark of society but also because of its interest in the economic welfare of the wife and children. If the court in question actively inquired into the adequacy of the parties' private arrangements its failure to make a support decree should indicate state approval of the agreement. The final point made by the court makes too much out of an unfortunate choice of words. This part of the opinion would be much more convincing if the court had emphasized the character of the property turned over to the wife under the settlement—a car and all their furniture.

Modification of Decrees Based on Agreements.—Perhaps in most decrees in matrimonial actions the "money provisions" reflect an agreement by the parties rather than a determination by the court. In part this bespeaks unwillingness to risk a judicial determination but there is also, in many cases, an assumption that the agreement fixes definitely all future rights and obligations. How far is this assumption justified?

Two basic questions are involved in these cases—what is the agreement of husband and wife and to what agreements of husband and wife will the law give effect. Thus, they may agree on a division of actual property, or to put the husband's imposed-by-law duty to support on a contractual basis, or merely as to what alimony shall be initially decreed. And a given state may regard any agreement as binding, or may hold only property settlements not subject to modification. A few cases this year involved real questions of interpretation. More often the courts indulged in strained construction of an agreement either to avoid having to face the policy question or to avoid having to apply a policy already marked out.

Peer v. Peer,⁴⁵ though not a modification case, illustrates both points. *W* got a divorce, the decree incorporating a lump-sum property settlement. Two weeks later she moved to amend the decree to provide for separate maintenance and to award alimony. The trial court amended the decree in so far as it affected the status but let the property settlement stand. This was held to be error because there was no statutory authority for an award of property to a wife in a separate maintenance suit.⁴⁶ As the dissent points out there was no

⁴⁵ 335 Mich. 260, 55 N.W.2d 821 (1952).

⁴⁶ Cf. *Hafner v. Hafner*, 54 N.W.2d 854 (Minn. 1952), 37 Minn. L. Rev. 395

question of compelling the making or acceptance of a settlement in gross. It was not a matter of the parties enlarging the power of the court by private agreement, but of the wife agreeing to forego her right to such alimony as the court might decree in consideration of a lump payment. The majority may well have felt that when the marriage continues a husband should not be able to discharge his duty to support for life by a lump payment. Unwilling to state this flatly it reached the desired result by misreading the agreement as a mere stipulation.

In *Millheiser v. Millheiser*⁴⁷ an agreement incorporated in a divorce decree provided that *W* was to receive certain royalties and crop rentals "in lieu of alimony" until her death or remarriage. There was also a recital that the contract was a "full, fair and equitable settlement of their respective property rights." *H* sought a modification of the decree. The court held that the agreement was a division of property rather than a contract to support and so not subject to modification. It may be that the court was misled by the character of *H*'s performance—undoubtedly a conveyance of specific property—when it should have concentrated on what *W* gave as consideration. If she gave up her interest in property retained by *H* it was a true property settlement; if she gave up her cause of action for alimony it was a contract to support no matter in what currency *H* was to make payment. A reading of the agreement suggests the parties intended the latter, or perhaps both. But if this court misinterpreted the agreement it was clearer than many as to the consequences of its interpretation. Since the agreement was not intended to discharge the duty to support it is no bar to a support award.

In *Werner v. Werner*⁴⁸ the agreement provided that *H* and *W* were each to have certain items of property and that *H* was to make monthly payments for *W*'s support and maintenance. The latter provision was held subject to modification. Since *W* received all or more than her share of the community property at the outset, the periodic payments must have been intended to discharge the duty to support rather than as compensation for property retained by *H*.

*Sasanoff v. Sasanoff*⁴⁹ was a less clear-headed decision. The agreement was very similar to that in the *Werner* case and apparently the specific property retained by each was of equal value. In addition the agreement recited that it was "a full and complete satisfaction of

(1953), 3 Utah L. Rev. 394 (1953) (agreement to divide real property incorporated in decree reformed for mistake or fraud; dissent argued decree was an adjudication and not to be treated as a contract).

⁴⁷ 261 P.2d 69 (Wash. 1953).

⁴⁸ 260 P.2d 961 (Cal. App. 1953).

⁴⁹ 260 P.2d 840 (Cal. App. 1953).

all claims . . . such as . . . alimony." It was held a property settlement and thus unmodifiable. The court seems to have succumbed to the verbiage of the agreement but there is also a suggestion that an agreement, even though plainly made in consideration of *W*'s release of her right to support, is yet unmodifiable if inextricably intertwined with an over-all adjustment of rights. The notion here is that the policy against allowing a wife to sign away her right to support is of but middling strength.

In *Maybaum v. Maybaum*⁵⁰ the incorporated agreement required *H* to pay \$25,000 in \$150-monthly installments. In *Underwood v. Underwood*⁵¹ it provided for lifetime payments. In each case *H* sought to be relieved from further liability after *W* remarried. In each the agreement was held an unmodifiable property settlement. The *Maybaum* case applied California law. The opinion suggests, in places, that the payments were part of a division of community property, in others, that the payments were for support but were inextricably intertwined. In the end main reliance seems to be put on the intent of the parties to make a firm settlement. Intent was likewise controlling in the *Underwood* case. There the express language of the agreement made it clear that *W*'s right to support was the consideration. The opinion notes in passing that the parties had considerable property and that *W* had strong equities in it, but the court was seemingly concerned only in establishing that the parties had not intended a mere stipulation as to initial alimony. The case is particularly interesting because the policy question has been "settled" in Florida by a statute providing that support awards may be modified whether or not based on agreement.⁵² The *Underwood* case is one of a line⁵³ substantially emasculating the statute: it does not apply to property settlements and we have a property settlement if the parties intend that the agreement should not be subject to modification.

*Newman v. Newman*⁵⁴ held an incorporated agreement modifiable. The intent of the parties to effect a firm contract for support was plain. It was also plain they had no significant property to divide. However, earlier Ohio decisions⁵⁵ had not clearly established a limitation on husband and wife's freedom of contract and there is no real discussion

⁵⁰ 349 Ill. App. 80, 110 N.E.2d 78 (1952).

⁵¹ 64 So.2d 281 (Fla. 1953).

⁵² Fla. Stat. § 65.15 (1951).

⁵³ *Vance v. Vance*, 143 Fla. 513, 197 So. 128 (1940); *Dix v. Dix*, 140 Fla. 91, 191 So. 205 (1939).

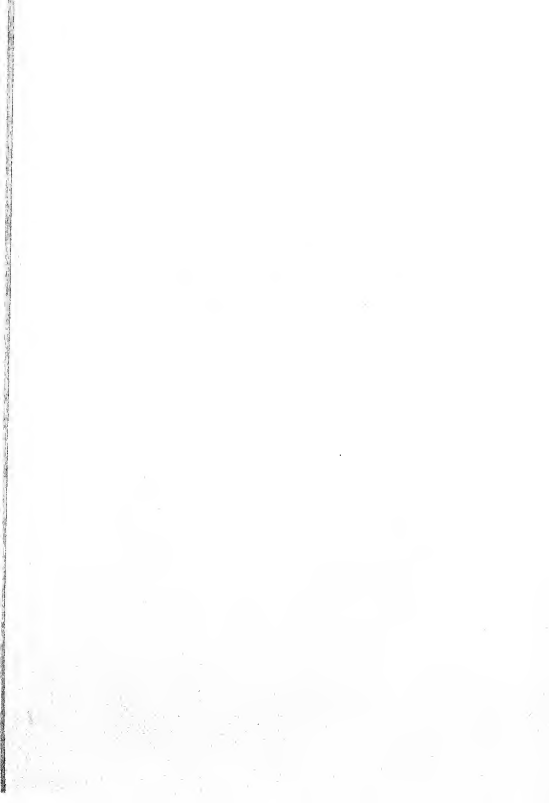
⁵⁴ 113 N.E.2d 376 (Ohio App. 1953).

⁵⁵ *Tullis v. Tullis*, 138 Ohio St. 187, 34 N.E.2d 212 (1941); *Holloway v. Holloway*, 130 Ohio St. 214, 198 N.E. 579 (1935); *Law v. Law*, 64 Ohio St. 369, 60 N.E. 560 (1901).

of the policy question in the present case. The court was perhaps chiefly influenced by the fact that the agreement, made in 1933 when the parties were in modest circumstances, gave *W* a percentage of *H*'s income with a \$4,000 ceiling and *H* had since become a millionaire. The court might have reached the desired result, without deciding that support contracts as such are not binding, by holding that this support contract was rescindable because the parties had not intended to assume the risk of such an extreme change of fortune.

A decree based on an agreement was also held modifiable by the New Jersey court in *Schluter v. Schluter*.⁵⁶ The wrinkle here was that, in an agreement making a comprehensive adjustment of the affairs of a wealthy couple, only the provision relating to monthly support payments was submitted to the court and reflected in the decree. The court, having satisfied itself that alimony decrees are generally modifiable, concluded that when the parties sought to put part of their agreement in the form of a decree they must have desired a decree of the usual kind. Here again it was fairly evident the parties intended a permanent arrangement. The real issue was whether the law should allow them to make one.

⁵⁶ 23 N.J. Super. 409, 93 A.2d 211 (App. Div. 1952).



PART FOUR

Property and Procedure

REAL AND PERSONAL PROPERTY

ELMER M. MILLION
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THE PRESENT article consists of six subdivisions separately prepared by four different contributors. The two outstanding developments in the entire field were the passage by Congress of the Submerged Lands Act ("Tidelands"), with its immediate challenge in the courts, and a decision by the Supreme Court of the United States declaring unconstitutional any rendition of damage judgments by state courts for breach of racial restrictive covenants. Third in importance is federal rent control, a hard-dying temporary measure, whose demise in 1953 had been freely forecast, but which outlived that year.

Although a few property books appeared during the year,¹ the attention of the profession, and particularly of the law-teaching profession, was pre-empted by the *American Law of Property*, published a year earlier.² An increasingly important contribution is being made

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This article does not include eminent domain or attempt a systematic coverage of pertinent state legislation. Easements decisions worthy of note will be mentioned in next year's article.

The Landlord and Tenant section of this article was written solely by Professor Lesar, Vendor and Purchaser by Dean Kharas, Oil and Gas Law, Water Law, and Mineral Law by Professor Martz, and the remainder of the article by Professor Million.

¹ Goddard, *California Landlord-Tenant Law and Procedure with Forms* (3d ed. 1952); Jahr, *Eminent Domain* (1953); Kratovil, *Real Estate Law* (2d ed. 1952); Orgel, *Valuation under the Law of Eminent Domain* (2d ed. 1953); Yokley, *Zoning Law and Practice* (2d ed. 1953) (2 volumes).

² Reviews of *American Law of Property* during 1953 include Sparks, 28 N.Y.U.L.

by the various annual summaries of the developments in the law of property in a given jurisdiction.³

I

REAL PROPERTY AND PERSONAL CHATTELS

Accretion.—Dredging operations conducted in Mobile Bay by the Federal Government caused the building up of additional land between that of the littoral owner and the bay. The State of Alabama filed a bill to quiet its title in this reclaimed land, the defendant littoral owner countering with a cross-bill seeking the same relief. The trial court quieted title in the littoral owner. On appeal, the Supreme Court of Alabama, applying Alabama law, declared that this accreted or reclaimed land should accrue to the littoral owner rather than to the state.⁴ Citing an 1838 Alabama decision that "[a]ccretions to the upland made by a stranger 'without the authority of government' "⁵ accrue to the littoral owner who otherwise would be deprived of that status by the interposition of the intervening land, the court held that the actions of the Government were those of a stranger, done "without the authority of [the State] government." From this, it would follow that, subject only to the paramount rights of the United States and the state in aid of navigation, the new land accreted to the littoral owner. Although the state owned the bed of the bay qua bay, it did not so own the individual grains of sand that its ownership would continue in such grains after they became part of accreted land.⁶ Because the constitution of Alabama forbade making the state a defendant, which provision applied also to cross-bills against the state, the court below erred in granting relief on the cross-bill, so the decree was modified to grant the littoral owner relief *on his answer*, the constitutional provision not prohibiting this.⁷

Rev. 1052; Aigler, 51 Mich. L. Rev. 1107; Allen, 48 N.U.L. Rev. 523; Cranston, 5 Stan. L. Rev. 890; Dunham, 53 Col. L. Rev. 440; Fritz, 31 Tex. L. Rev. 611; Keenan, 27 St. John's L. Rev. 401; Keyes, 24 Boston Bar Bull. 46; Nossaman, 66 Harv. L. Rev. 1338; Page, 13 Md. L. Rev. 276; Rarick, 37 Minn. L. Rev. 640; Symposium, 41 Calif. L. Rev. 349; Telft, 46 Law Lib. J. 45. Compare the review by Schuyler, 39 A.B.A.J. 223 (1953), with the subsequent and somewhat more critical review by the same writer, 101 U. of Pa. L. Rev. 1250 (1953).

³ Among such summaries published in the past year concerning personal property are Platt, 7 Rutgers L. Rev. 182; Rehberg, 4 Mercer L. Rev. 120; Warren, 6 Vand. L. Rev. 1113. Typical of the better local annual summaries of real property law is Trautman, Real Property, 6 Vand. L. Rev. 1080 (1953).

⁴ State v. Gill, 66 So.2d 141 (Ala. 1953).

⁵ Id. at 142, citing Hagan v. Campbell, 8 Port. 9 (Ala. 1838).

⁶ The court might have said that state ownership of the bay included ownership of the grains of sand, but that such ownership of the grains was lost by *accession* or by analogy thereto. See Brown, Personal Property § 26 (1936); Ricketts v. Dorrel, 55 Ind. 470, 472 (1876).

⁷ Presumably the court means, not that relief is granted, but simply that the rights

*Adverse Possession.*⁸—An examination of more than eighty-three decisions from twenty-seven states, including cases in twenty courts of last resort, yielded an interesting cluster of cases presenting both clearly catalogued facts which showed something less than a fenced enclosure or the erection of substantial improvements, and rulings on whether such facts were sufficient for adverse possession. In some cases, lower court decisions were affirmed which either held the presented evidence to be insufficient to establish title by adverse possession,⁹ or held it to be sufficient.¹⁰ In another case, a jury verdict based on a finding that title had been acquired by adverse possession was reversed on appeal as unsupported by the evidence.¹¹

Of several decisions dealing with what constitutes color of title,¹²

of the littoral owner can be set up defensively in the answer and recognized for that purpose, with the practical effect that other persons will be persuaded that, should a suit arise between them and the littoral owner, the court would uphold ownership in the latter.

⁸ See Hutchison, *Requisites of Adverse Possession in Ohio*, 22 U. of Cin. L. Rev. 480 (1953); Montgomery, *Adverse Possession of Land Titles in Utah: Part I*, 3 Utah L. Rev. 294 (1953) (the first part of a projected two-part treatment).

⁹ Spradling v. May, 65 So.2d 494 (Ala. 1953) (wild swamp land, inundated each rainy season, virtually inaccessible; record owners and adverse claimant each paid the taxes, hunted on the land, and cut timber thereon; record owner executed and recorded various lease instruments during the period; adverse claimant pastured cattle thereon except during the rainy season); Duke v. Harden, 66 So.2d 899 (Ala. 1953); Smith v. Pyles, 78 S.E.2d 5 (Ga. 1953). In Pender v. Jackson, 260 P.2d 542 (Utah 1953), the Utah statute provided that a person claiming title by a written instrument should be deemed in adverse possession if, though unenclosed, the land was used "for the ordinary use of the occupant." The court held that the mere holding of land for purposes of speculation or future sale did not come within the quoted language, even though the claimant was a *real estate dealer* and his vocation and claim were known to the real owner.

¹⁰ Tucker v. Hankey, 173 Kan. 593, 250 P.2d 784 (1952) (one judge dissenting); Hayward v. Marker, 334 Mich. 659, 55 N.W.2d 143 (1952) (contiguous owner, with color of title to strip of rough, undeveloped timber and underbrush land, paid taxes thereon throughout the statutory period, repeatedly trimmed existing trees, shored up the lake front, and cleared away underbrush; on several occasions planted a row of pines, used the strip for picnics, and had her son spend several summers on the strip; built a road across it, and ultimately erected a house thereon); Sessoms v. McDonald, 237 N.C. 720, 75 S.E.2d 904 (1953); Brewster v. Herron, 255 P.2d 931 (Okla. 1953), opinion later withdrawn by order of court, 255 P.2d ix (1953) (continued possession by mortgagor after date of decree foreclosing mortgage and a sheriff's sale pursuant to such decree but before the judicial confirmation thirteen years later, was under all the circumstances involved, adverse possession) (one judge dissenting).

¹¹ Memory v. Walker, 209 Ga. 916, 76 S.E.2d 698 (1953). Van Valkenburgh v. Lutz, 304 N.Y. 95, 106 N.E.2d 28 (1952), reargument denied but remittitur amended, 304 N.Y. 590, 107 N.E.2d 82 (1952), was widely commented upon: 27 N.Y.U.L. Rev. 1068 (1952); 17 Albany L. Rev. 181 (1953); 19 Brooklyn L. Rev. 145 (1952); 2 Buff. L. Rev. 111 (1952); 27 St. John's L. Rev. 121, 151 (1952).

¹² See also Note, 31 N.C.L. Rev. 478 (1953). Cf. Chaney, *Prescription under Article 852, 13 La. L. Rev.* 582 (1953). In Cook v. Rochford, 60 So.2d 531 (Fla. 1952) the Florida court correctly held that where the sole owner had devised land to two persons as equal tenants in common, a subsequent conveyance by one of these cotenants

the most intriguing is *Justice v. Mitchell*,¹³ a North Carolina case which held insufficient for title under its seven-year adverse-possession-under-color statute a son's possession of land under a written deed of gift from his mother, although such possession had continued for nine and a half years before her death and several years thereafter. The deed was recorded after the mother died. The mother's will devised a life estate in the land to this son, with remainder over. In affirming a judgment that title had not been acquired, the court pointed out that the unrecorded deed was originally valid as between the parties; that "color of title is a writing professing and appearing to pass title, but failing to do so"; that therefore the deed could not operate as *color* except from a date two years after its execution (the statute invalidating deeds *ab initio* if unrecorded within two years); and that although by becoming void the deed thus became *color*,¹⁴ possession had not continued for seven full years thereafter before the death of the grantor; and that finally, the grantor's death interrupted the running of the statute because the grantor devised a life estate to the occupant, and hence possession by the latter from the grantor's death would not be adverse to the remainderman devisee. Admittedly, a deed seemingly valid on its face and purporting to convey title but actually void, is normally "color of title." As an original proposition, however, it does not necessarily follow that a valid deed is incapable of being *color*.¹⁵ Certainly the grantee-possessor should be able to make out his title by adverse possession or by reliance on his deed's validity, in the alternative and, what is more, should simultaneously be able to rely on a deed as a valid deed against his grantor and as *color* of title against strangers. Because the majority of juris-

of "all my right, title and interest" in the premises, followed by the possession of the land by his grantee, did not constitute *color* of title as to the nonconveying cotenant's half interest as against the latter.

¹³ 78 S.E.2d 122 (N.C. 1953).

¹⁴ The court conceded this point, arguendo, without deciding it. *Id.* at 125. That a deed unrecorded after two years would not be *color* as against a bona fide grantee recording a subsequent deed from the common grantor, or a judgment creditor of the grantor, but would be *color* as against a non-bona fide grantee by recorded deed from that grantor or against any grantee from a different source, see *Eaton v. Doub*, 190 N.C. 14, 128 S.E. 494, 40 A.L.R. 273 (1925).

¹⁵ Notwithstanding contrary North Carolina authority and cases cited in 1 Am. Jur. 895 n.16. Many of the cases relied on could be otherwise explained. Thus *Barnesville v. Stafford*, 161 Ga. 588, 131 S.E. 487, 43 A.L.R. 1045 (1926), which held insufficient a claim of adverse possession title, declared that the deed relied on did not constitute *color* since it was a valid conveyance. It is to be noted, however, that the deed contained a limitation or condition subsequent and that the grantee was trying to defeat that condition by his claim of adverse possession. Possession had not continued for the longer period required of possessions not under *color*, and the court could have contented itself by pointing out that possession under a deed as *color* is subject to the qualifications expressed in the deed.

dictions do not make recording a condition of validity as between the parties to a deed, the exact problem presented by the North Carolina case does not often arise elsewhere.

Under the Arkansas statute vesting title in anyone who, having color of title to "wild and unenclosed land," pays taxes thereon for seven successive years, it has been reaffirmed that lands formerly improved but which have lapsed back into a wild state are within the purview of that phrase.¹⁶ The same decision also affirmed the rule that possession of a part of a parcel of unimproved Arkansas land, under color of title to the whole, does not constitute constructive adverse possession of the unoccupied part, where the true owner has continued to pay the taxes thereon.

Several courts recognized and followed the rule that, although acquisition of title by adverse possession requires an intention to claim title, this intention need not be manifested by word of mouth (or by writing) but can be implied from the possessor's acts and surrounding circumstances.¹⁷

In Kentucky, in a case where the asserted adverse possessor had actually resided on the land for the statutory period, it was held that her payment of taxes, while insufficient to prove that she intended to hold adversely, somewhat strengthened her claim that she had believed the land to be her own.¹⁸

The overwhelming majority view is that adverse possession initiated by A against the life tenant B does not cause the statutory period to commence running against the remainderman C until after the death of B, even though the statutory period elapses before B's death,¹⁹ but that once adverse possession has commenced, the fee

¹⁶ *Wimberly v. Norman*, 253 S.W.2d 222 (Ark. 1952).

¹⁷ *Tucker v. Hankey*, 173 Kan. 593, 250 P.2d 784 (1952); *Hauer v. Van Straaten Chemical Co.*, 415 Ill. 268, 112 N.E.2d 623 (1953). Cf. *Phelps v. Higgins*, 257 S.W.2d 25 (Ark. 1953), correctly reversing a judgment based on a jury finding of title by adverse possession, where the instruction had simply mentioned the need of a "claim for the statutory period" without mentioning the need that other requisites of adverse possession exist. See also the legal periodical criticisms of *Van Valkenburgh v. Lutz*, cited in note 11 *supra*.

¹⁸ *Sweeten v. Sartin*, 256 S.W.2d 524 (Ky. 1953) (wife who helped pay for lots which her late husband had falsely said were being deeded to them as joint tenants, acquired title by adverse possession as against the third person actually named in the deed as sole grantee). To the same effect see *Sessoms v. McDonald*, 237 N.C. 720, 75 S.E.2d 904 (1953). *Walker v. Easterling*, 215 Miss. 429, 61 So.2d 163 (1952) ("powerful evidence of claim of right"). Cf. *B. W. & Leo Harris Co. v. City of Hastings*, 59 N.W.2d 813 (Minn. 1953) ("payment of taxes, although evidence of a claim of title . . . not evidence of adverse possession").

¹⁹ See 22 Tenn. L. Rev. 968 (1953) (recognizing this rule, with two possible qualifications, although noting approvingly a decision that where T, a life tenant, devised "to A for life, remainder to B," both A and B having supposed T to be the fee owner, whereas B was really the remainderman, A's possession for the statutory period after T's death vested A with a life estate as against B).

owner cannot, by purporting to create successive estates in strangers M and N, prevent title's being acquired in the entire fee rather than merely in the first of such ostensible estates. In general, adverse possession is not interrupted by the disseisee's execution of an inter vivos conveyance or by his dying testate or intestate, and the above inability to thwart the statute by an inter vivos conveyance should also apply to testamentary dispositions. A difficulty arises, however, where the deed, will or intestacy would make the adverse possessor a life tenant or cotenant. It would seem that X should not be allowed to thwart A, the pre-existing adverse possessor, by conveying "to A, M and N" or "to A for life, remainder to M and N" any more than by a conveyance "to M for life, remainder to N." Where the inclusion of A in a conveyance (or devise) was for the very purpose of defeating the statute it must obviously be disregarded unless A purports to accept the gift. If this seems to slight the question of whether M and N had notice of A's adverse claim, it may be suggested that even purchasers for value have notice of the claims of one in possession. Two current North Carolina cases involving this problem, however, permitted the defeat of the adverse possessor, in one case by a devise and in the other by intestacy.

In one case the Supreme Court of North Carolina held that adverse possession by a son under a claim of fee against his mother, the fee owner, was defeated by her devising the land to the son for life, remainder to another. The court held that the son could not renounce his rights under the will in order to complete title against the remainderman devisee. The opinion neither suggested that the testator was attempting to defeat the running of the statute, nor indicated whether such a purpose would be material to its decision.²⁰ In the other case the same court held that death intestate of the disseisee before the statute had completely run served to interrupt the statute, despite the continued sole possession for the balance of the statutory period, because the adverse possessor happened to be one of the disseisee's heirs.²¹ The decision was warranted by earlier local precedents.

A different but somewhat analogous problem is presented by *Kimble v. Willey*²² in which the judgment cited in last year's *Survey*²³ was vacated on rehearing,²⁴ the latter judgment upholding a ruling

²⁰ *Justice v. Mitchell*, 238 N.C. 364, 78 S.E.2d 122 (1953).

²¹ *Wilson v. Wilson*, 237 N.C. 266, 74 S.E.2d 704 (1953).

²² 204 F.2d 238 (8th Cir. 1953).

²³ 1952 Annual Surv. Am. L. 517, 28 N.Y.U.L. Rev. 580 (1953). It was also noted in 6 Okla. L. Rev. 214 (1953); 37 Minn. L. Rev. 144 (1953), and 4 Syracuse L. Rev. 307 (1953).

²⁴ This latter ruling is also discussed hereafter on p. 614 infra.

that the running of the statute in Arkansas in favor of an adverse possessor is not interrupted by the action of his tenant in taking, while still in possession and without notice to the adverse possessor, a written lease from the record owner of the premises. The court quoted with apparent approval from a leading text²⁵ that the statute would be interrupted if the record owner neither knew nor had reason to know that the occupant acknowledging his title was already the tenant of another, but would not be interrupted by the acknowledgment if the record owner knew or should have known of the prior tenancy.

A New Mexico decision purporting to embrace the majority view that a tax sale for delinquent taxes interrupts the running of the adverse possession statute, since the statute does not run against the state,²⁶ invites further comment. First of all, no actual adverse possession began until after the tax sale to the state and a subsequent deed from the state to the adverse possessor. In refusing to permit the latter to add his eight years of possession to the two preceding years that the state asserted title, the court was simply denying tacking. Its statement that, because the state owned the land until it deeded it to such claimant, the statute did not run while the state was owner is inconsistent with the further statement that the tax deed was entirely void and gave the state no title whatever.²⁷ On principle, it would seem that where actual adverse possession exists and is in fact undisturbed by a purported tax sale to the state and a subsequent sale by the state to a stranger, neither of such void sales should interrupt the statute as between the actual possessor and the person who held paper title prior to such sales. Where such a void sale may be collaterally attacked, the right of the paper owner to sue has never been interrupted.

The Supreme Court of Mississippi affirmed a holding that, where one thinking himself the owner executed a deed to land but remained in possession of the land for many years thereafter (having discovered after executing his deed that the land was still government land), and ultimately acquired title thereto from the subsequent patentee, such grantor acquired title by adverse possession against his own grantee. Whether the deed contained covenants of warranty is not stated, but the court quoted an earlier precedent that such covenants would not prevent the grantor's asserting title by subsequent adverse possession. Notice to the grantee was imputed from the grantor's long-continued

²⁵ 4 Tiffany, Real Property § 1168 (3d ed. 1939).

²⁶ Pratt v. Parker, 255 P.2d 311 (N.M. 1953).

²⁷ An entirely different question is whether the statute runs in favor of the state where the state took under a void tax sale.

possession and retention of all rents and profits, the fact that the grantor regularly paid the taxes while the grantee never paid any, and the recordation of the subsequent patent and the deed from the patentee.²⁸

Easily the least startling decision of the year was the dismissal of still another suit which sought to recover from Trinity Church the lower Manhattan lands which the church has successfully defended in numerous such actions brought against it during the last 118 years. The most recent plaintiff urged that none of the many prior holdings that suits against Trinity for this land were barred by the statute of limitations had construed a 1784 charter provision which this plaintiff alleged to contain a prohibition against Trinity's benefiting from the statute of limitations. The court, while quoting from earlier cases to indicate that this very contention had been passed upon several times before, placed its decision on the ground of *res adjudicata*, as the plaintiffs claimed through persons defeated in earlier suits.²⁹

*Bailments.*³⁰—An important decision was rendered regarding the ability of an interstate carrier to limit its liability for negligent loss of hand baggage. The plaintiff, having purchased from the defendant railroad one ticket from Meriden to New Haven (both in Connecticut) and another from New Haven to Fall River, Massachusetts, arrived in New Haven and surrendered her bag to a red cap with instructions to deliver it to her at the train leaving an hour later for Fall River. The bag was not returned to her, having been lost by the negligence of the railroad. The plaintiff sued for \$615, the value of the bag and contents. The railroad insisted that its liability was limited to \$25, because its tariff schedule on file with the Interstate Commerce Commission limited to \$25 its liability for baggage entrusted to red caps, except where the passenger declared a greater value in writing. The plaintiff had made no such written declaration, was ignorant of the existence of this provision, had not yet paid the red cap, and did not

²⁸ *Walker v. Easterling*, 215 Miss. 429, 61 So.2d 163 (1952). For a similar ruling permitting a mortgagee in possession to acquire adverse possession title against his mortgagor, see *Fogle v. Void*, 223 S.C. 83, 74 S.E.2d 358 (1953), 5 S.C.L.Q. 609.

²⁹ *McClatchie v. Rector of Trinity Church*, 123 N.Y.S.2d 741 (Sup. Ct. 1953), *aff'd*, 283 App. Div. 657 (1st Dep't 1954). The present action, originally brought in an upstate county, underwent a change of venue to the situs. *McClatchie v. Rector*, 118 N.Y.S.2d 648 (Sup. Ct. 1953). For an early decision adverse to the plaintiff's predecessor, consult *Bogardus v. Trinity Church*, 15 Wend. 111 (N.Y. 1835), affirming 4 Paige's Ch. 178 (1833).

³⁰ Of possible interest because it reviews a great body of English precedents frequently cited in this country is *Paton, Bailment in the Common Law* (1952), reviewed in, *inter alia*, 16 Mod. L. Rev. 392 (1953). The peculiar "bailment lease" recognized in Pennsylvania was discussed in *Freedom Nat. Bank v. Northern Illinois Corp.*, 202 F.2d 601 (7th Cir. 1953).

receive a claim check from him. The railroad had not posted signs calling attention to this limited liability provision. The trial court judgment for the full \$615 was affirmed by the Supreme Court of Errors of Connecticut.³¹ The court recognized that the filed tariff was applicable in interstate commerce transactions notwithstanding lack of actual knowledge thereof by the passenger, but held that the loss occurred during a bailment for safekeeping rather than as an incident to an interstate commerce transaction. Accordingly, the tariff schedule was deemed to be inapplicable, and the railroad's liability was based on the local law of bailments. The Supreme Court granted certiorari,³² and held without dissent that the bailment was incident to an interstate journey (and accordingly governed by federal law), but affirmed the judgment on the ground that the filed schedule was inapplicable because the railroad had neither given the passenger notice of the limitation nor afforded her an opportunity to express a choice as between the minimum- and excess-value categories.³³

An examination of some forty additional bailment cases from eighteen jurisdictions disclosed no landmark decisions. Several cases concerned bailments of fur coats,³⁴ and several others involved loss or

³¹ *Nothnagle v. New York, N.H. & H.R.R.*, 139 Conn. 278, 93 A.2d 165 (1952). Brown, C.J., and Roberts, J., dissented on the ground that the bailment was inescapably an incident of an interstate trip, the plaintiff's status as passenger continuing during the one-hour layover. *Id.* at 283, 93 A.2d at 167.

³² *New York, N.H. & H.R.R. v. Nothnagle*, 345 U.S. 903 (1953).

³³ *New York, N.H. & H.R.R. v. Nothnagle*, 346 U.S. 128, 132 (1953). After noting that Congress had formerly forbidden any such limitation of liability, but had in 1916 softened the law to permit it as to "baggage carried on passenger trains" and "property . . . received for transportation concerning which the carrier shall have . . . [established rates] dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value. . . .", the Court noted that the first-quoted phrase referred to baggage carried free on the passenger's ticket and did not include hand baggage carried by the passenger. The latter-quoted phrase could have included the instant transaction, but did not, since the railroad had not afforded the passenger a chance to make a value declaration. The schedule filed pursuant to this statutory phrase purported to refuse to handle baggage valued in excess of \$500. The Court left open the question of the validity of that provision.

³⁴ In *Franklin v. Airport Grills, Inc.*, 21 N.J. Super. 409, 91 A.2d 348 (App. Div. 1952), a customer had checked her fur coat in the restaurant checkroom, the restaurant shortly thereafter being destroyed by fire without fault of the proprietor. A judgment in favor of the customer for the value of her coat was reversed on appeal, evidence showing that the check girl remained during the fire until every patron presenting a claim check was served, the plaintiff apparently not having presented her claim check, and that the restaurant staff had done everything possible to prevent the spread of the fire, having sufficiently rebutted the initial presumption of negligence. In *Schleisner Co. v. Birchett*, 96 A.2d 494 (Md. 1953), a department store employee recovered from her employer for the loss of her coat, which she had left in an unlocked executive closet at the instruction of the personnel manager to whom she had applied for access to a locker. In *Grain Dealers Nat. Fire Ins. Co. v. Union Co.*, 159 Ohio St. 124, 111 N.E.2d 256

damage to automobiles parked in parking lots³⁵ or bailed to a garage for repairs.³⁶ In a somewhat unusual case, an owner who was leaving town for ten days left his car with a garage with instructions that it be serviced and returned to the street in front of the owner's home, *the keys to be left in the ignition*. After servicing the car the garage-man, who did not know where the owner lived, parked the car in front of the correct house number but on the wrong street. The car disappeared. The car owner sued for the value of the car, and appealed from an adverse decision. In affirming this denial of relief, the Superior Court of New Jersey, Appellate Division, held that the car was lost primarily through compliance with the car owner's instructions that it be left unattended with keys in the ignition.³⁷ Passing reference is made to two reported decisions involving liability for damage to bailed airplanes,³⁸ two law review comments on safe-deposit boxes,³⁹ two notes on innkeepers⁴⁰ and two cases involving bailments of grain.⁴¹

(1953), the warehouseman did not at the time he received the coat purport to limit his liability. His subsequent execution of a "warehouse receipt" containing such limitations was held ineffective against the bailor who was unaware of them.

³⁵ *Parkade Corp. v. Locke*, 260 P.2d 1084 (Okla. 1953) (recovery allowed where car damaged by bailee's employee while being driven up a ramp in the parking garage); *Recent Cases*, 24 *Miss. L.J.* 243 (1953) (criticizing an Ohio inferior court holding that no bailment existed where the parking lot had car owners park and lock their own cars and retain the keys); 1 *Kan. L. Rev.* 88 (1952) (efficacy of parking lot ticket purporting to limit liability).

³⁶ *Thrasher v. Greenlease-Ledterman, Inc.*, 257 P.2d 795 (Okla. 1953) (evidence having shown a bailment to garage for purposes of repair rather than for safekeeping, garage not liable for theft accomplished by an ex-employee who entered garage at night by breaking window and unlocking doors from inside).

³⁷ *Kandret v. Mason*, 26 N.J. Super. 264, 97 A.2d 730 (App. Div. 1953). From conflicting testimony, the court concluded that the car owner had given the garage the wrong address, or at least had given only the house number without specifying the street name, but declared that even if he gave the garage his full and correct address, recovery was still properly denied. The plaintiff's father lived near the correct address, but there was no evidence that he had been asked to look after the car.

³⁸ *Lake Air, Inc. v. Duffy*, 256 P.2d 301 (Wash. 1953) (bailee making nocturnal nonemergency landing in pasture, in violation of bailment agreement, was liable for damage inflicted in landing); *Davies Flying Service, Inc. v. United States*, 114 F. Supp. 776 (W.D. Ky. 1953) (bailment contract provision that owner assumed all responsibility for damage or loss of plane except that due to negligence of bailee's personnel rendered inapplicable the general rule requiring the bailee to negate negligence).

³⁹ *Reeves, The Safe Deposit Company: What Law Should Apply?*, 4 *Syracuse L. Rev.* 274 (1953); *Recent Case*, 14 *U. of Pitt. L. Rev.* 127 (1952).

⁴⁰ *Notes, Hotelkeepers Liability for Negligent Loss of Property of a Guest*, 57 *Dick. L. Rev.* 348 (1953); *Hotel Law in Virginia*, 38 *Va. L. Rev.* 815 (1952) (liabilities and remedies between hotels and their guests).

⁴¹ *Dawson v. United States*, 203 F.2d 201 (5th Cir. 1953), affirming the conviction of a warehouseman for converting to his own use grain bailed to him, held that the contract requiring the warehouseman to insure the grain and authorizing him to commingle it with like grain of other bailors did not change the relation from one of bailment to one of sale.

In *Woodward Co-operative Elevator Ass'n v. Johnson*, 207 Okla. 217, 248 P.2d 1002

A third decision involving a grain bailment requires closer attention. It arose in Kansas, and concerned that portion of the grain in a grain warehouse which became defective and deteriorative as a result of inundation by flood waters during the 1951 Kaw River rampage. The Kansas statutes regulating grain warehousemen provide that whenever a public warehouseman discovers that any grain stored in his warehouse is "out of condition, or becoming so" and is beyond his power to preserve, he shall give certain notices and be authorized to sell or otherwise dispose of the grain and, if not otherwise at fault, shall be liable only to the extent of the proceeds received at such sale. The statute further provides that such out-of-condition grain shall be separated from the other grain in the warehouse and shall be deemed to belong to the holder of the oldest outstanding warehouse receipts.

If the statutory phrase "out-of-condition grain" included flood-damaged grain, the bailor senior in time would bear the whole loss. The lower court so held, but the Supreme Court of Kansas reversed, held that flood-damaged grain did not come within the above language or within the purpose of the statute, and declared that the loss should therefore be borne proportionately by all the bailors.⁴²

The California district court of appeal, although citing no local precedents, adhered to the general rule that the hold-over doctrine applicable to leases of land does not apply to leases (bailments) of chattels.⁴³

Cotenancy.—An examination of more than fifty cases from twenty-eight jurisdictions, including decisions of twenty-three courts of last resort, plus an equal number decided in 1952, disclosed four clusters of decisions. The first group dealt with the creation of cotenancies, including the question of which type was created.

(1952), the owner of wheat properly recovered its value from one who bought it in good faith from the trucker to whom it had been bailed for hauling to a specified storage elevator. This is accepted law. The entrusting of possession, without a muniment of title or other additional indication of title or authority, is insufficient to permit the fraudulent bailee to pass title to a bona fide purchaser. *Accord*, *Panhandle Pipe & Supply Co. v. S. W. Pressey & Son*, 125 Colo. 355, 243 P.2d 756 (1952) (well-casing pipe of A, loaded onto truck of B who contracted to pay cash on delivery, but drove off without paying and over A's objection; bona fide purchaser from B not protected); *Sig Ellingson & Co. v. De Vries*, 199 F.2d 677 (8th Cir. 1952), followed in *Sig Ellingson & Co. v. Butenbach*, 199 F.2d 679 (8th Cir. 1952) and *Allen C. Driver, Inc. v. Mills*, 199 Md. 420, 86 A.2d 724 (1952) (Federal Packers and Stockyards Act, requiring market agencies to furnish to all comers reasonable stockyard services upon request, does not require handling of stolen cattle, but leaves unaltered the common-law liability to the true owner for conversion.). *Cf. Wren v. Bankers Inv. Co.*, 207 Okla. 339, 249 P.2d 712 (1952).

⁴² *Flour Mills of America v. Burrus Mills*, 174 Kan. 709, 258 P.2d 341 (1953).

⁴³ *Hayward Lumber & Inv. Co. v. Construction Products Corp.*, 117 Cal. App.2d 221, 255 P.2d 473 (1953), citing 8 C.J.S. 323.

In *Davis v. Davis*⁴⁴ the Supreme Court of South Carolina was unanimous that tenancies by the entirety do not exist in that state. The court was of two minds, however, as to precisely what estate was created by a deed whose granting clause read "to W and wife E, as tenants by entirety, and the survivor of them" and whose habendum read to W and E "and the survivor of them, their heirs and assigns in fee simple forever." Two justices reached the conclusion that the deed created a joint tenancy, citing in support the statement by Kent that the same words which make other persons joint tenants will make husband and wife tenants of the entirety, Tiffany's statement that the latter estate "is essentially a joint tenancy, modified by the common law theory that husband and wife are one person," and the court's earlier pronouncement concerning an 1882 deed, "It would seem that . . . 'estate by entirety' no longer exists in this state. . . . At least the separate estate acts should be given the effect to make her tenant in common with her husband in a grant to both, in the absence of any express intention in the deed to convey the whole to the survivor. . . ."⁴⁵ The majority of the court, however, held that the deed created a tenancy in common. The majority also held that when E predeceased W, W thereupon became vested with an estate (whether executory limitation or remainder) in fee as sole owner. That the dissenting justices who argued that a joint tenancy was created thought that upon E's death the joint tenancy was dissolved and the property distributable as if the estate had been a tenancy in common, presents a seeming paradox: a choice between joint tenancy without survivorship and tenancy in common with survivorship. The explanation is that the dissent relied on the South Carolina statute abolishing survivorship in joint tenancy and providing that upon the death of a joint tenant his interest shall be distributable as if he were a tenant in common.⁴⁶ The majority opinion, on the other hand, gave effect to the express words "and the survivor of them," and cited earlier decisions that the statute did not prevent the creation of a right of survivorship by express and unambiguous words. The result reached by the majority seems sound, and it may make little difference that the estate is not *called* joint tenancy; yet, since the statute abolished

⁴⁴ 223 S.C. 182, 75 S.E.2d 46 (1953). South Carolina originally recognized tenancy by the entirety, but after the enactment of statutes removing some of the wife's common-law disabilities, it was questioned whether the requisite oneness upon which that estate was based at common law sufficiently remained. The constitution of 1895 gave married women the same rights in their real and personal property as unmarried women or men enjoyed. The judges in the instant case felt that this complete emancipation unquestionably prevented entireties from arising thereafter in South Carolina.

⁴⁵ *Id.* at 199, 75 S.E.2d at 54, quoting *Green v. Cannady*, 77 S.C. 193, 201, 57 S.E. 832, 835 (1907).

⁴⁶ S.C. Code Ann. § 19-55 (1952).

survivorship as an *incident* of joint tenancy, rather than either joint tenancy or survivorship, one might ask whether, under different language, a joint tenancy with express survivorship would not arise.⁴⁷ Under a similar statute, a majority of the Supreme Court of Washington held such a result to be possible.⁴⁸

Other cases dealing with the creation of tenancy by the entirety included an Arkansas decision allowing the sole owner to convey to himself and his wife as tenants by the entirety, without using an intermediate conveyance to a third person,⁴⁹ and a Pennsylvania holding that a deed "to F, a single man, and J and M, his wife" constituted the husband and wife tenants by the entirety in a one-half interest held as a tenancy in common with F, who took the other half interest.⁵⁰ There were also two articles⁵¹ and several readable notes on entireties.⁵²

A creditor who thought tenancies by the entirety could no longer be created in Virginia was badly mauled in the wallet while discovering his error. Land had been conveyed to a husband and wife "as tenants by the entirety, with right of survivorship as at common law." Thereafter, the husband borrowed money from his father for unre-

⁴⁷ The court pointed out one objection to joint tenancies: the ability of any joint tenant to destroy the estate and thus its incident of survivorship by conveying his interest. Obviously, this will not be permitted in South Carolina where the clear intent is that the survivor shall from the beginning have a future interest in the estate. But what if the grantor makes clear that he means also to give each cotenant the power to convey an undivided half interest in fee? Whether anything is gained by the label *joint tenancy* where survivorship exists only by specification and not as an incident is another matter.

⁴⁸ *Holohan v. Melville*, 41 Wash.2d 380, 249 P.2d 777 (1952) (four justices dissenting). Cf. Notes, Creation of Joint Tenancy by Conveyance of Tenants in Common to Themselves, 40 Ky. L.J. 445 (1952); Survivorship Deeds in Ohio, 3 W. Res. L. Rev. 60 (1951).

⁴⁹ *Ebrite v. Brookhyser*, 219 Ark. 676, 244 S.W.2d 625 (1951), noted approvingly in 51 Mich. L. Rev. 121 (1952), 6 Southwestern L.J. 362 (1952). See also *Brown v. Havens*, 17 N.J. Super. 235, 85 A.2d 812 (Ch. Div. 1952) (since tenancy by entirety in personality is not recognized in New Jersey, a ninety-nine-year lease, renewable forever, conveyed to a husband and wife, became a tenancy in common, not by entireties).

⁵⁰ *Heatter v. Lucas*, 367 Pa. 296, 80 A.2d 749 (1951), 13 U. of Pitt. L. Rev. 167 (1951), 9 Wash. & Lee L. Rev. 145 (1952).

⁵¹ Kepner, The Effect of an Attempted Creation of Estate by the Entirety in Unmarried Grantees, 6 Rutgers L. Rev. 550 (1952); Ritter, A Criticism of the Estate by the Entirety, 5 U. of Fla. L. Rev. 153 (1952).

⁵² Notes, Tenancies by the Entirety in New York, 1 Buff. L. Rev. 279 (1952); The Statutory Status of Tenancies by the Entireties in Pennsylvania, 13 U. of Pitt. L. Rev. 149 (1951); Recent Cases, 13 Md. L. Rev. 43 (1953) (a conveyance "to J, S and M, his wife, as joint tenants, their assigns, the survivor or survivors of them, and the survivor's heirs and assigns in fee simple"); 17 Mo. L. Rev. 107 (1952); 25 Temp. L.Q. 521 (1952); 13 U. of Pitt. L. Rev. 763 (1952). See also the following on entireties in bank accounts: 22 Tenn. L. Rev. 302 (1952); 15 U. of Detroit L.J. 29 (1951); 5 Vand. L. Rev. 253 (1952). See also 50 Mich. L. Rev. 944 (1952) (entireties in Series E Savings Bonds). Cf. *Guldagen v. United States*, 204 F.2d 487 (6th Cir. 1953).

lated business purposes. Still later, the husband and wife joined in conveying the land in fee to the wife alone, reciting a consideration of love and affection. Three months after this latter conveyance, the father obtained judgment against the son for the unpaid loan. The father tried to set aside the conveyance to the wife, or otherwise reach the land, but was unsuccessful.⁵³ Pointing out that entireties had never been abolished in Virginia, and still existed where the creating instrument so provided, the court noted that Virginia had long followed the rule that the creditor of one spouse could not reach land held by the two spouses by entireties.⁵⁴ Therefore, since the entirety could have conveyed the land to a third person free of the husband's creditors, and since Virginia permits the spouses to join in a deed conveying land to either spouse, the wife held the land free of any claims by the husband's father.

Several other decisions involved the question of whether a joint tenancy was created.⁵⁵ Of these cases, *Bird v. Stein*⁵⁶ is particularly noteworthy. In it the federal district court, applying Mississippi law, held that a conveyance "to V and S, as joint tenants and not as tenants in common" created, V and S being husband and wife, a tenancy by the entirety rather than either a joint tenancy or tenancy in common. The court relied on two Mississippi decisions, one of which correctly

⁵³ *Vasilion v. Vasilion*, 192 Va. 735, 66 S.E.2d 599 (1951). The result of the court, but not the reasoning, is criticized in Note, 1 Wm. & Mary L. Rev. 138 (1952). Cf. Note, 57 Dick. L. Rev. 76 (1952) (Pennsylvania Married Women's Property Act of 1945 as affecting creditors of tenants by the entireties).

⁵⁴ A 1787 statute abolishing survivorship between joint tenants had been held inapplicable to entireties. Va. Code Ann. § 55-20 and annotations (1950). An 1850 statute specifically abolished survivorship between husband and wife except where the tenor of the instrument should make manifest that the interest of the dying spouse should belong to the survivor. Va. Code Ann. § 55-21 (1950). An 1877 statute substantially modified the marital rights of the husband. Neither of these statutes absolutely prevented tenancies by the entirety. Va. Code Ann. §§ 55-35 et seq. (1950). An 1888 statute provided in one section not only that subsequent transfers to husband and wife should vest in them as distinct moieties, but also abolished survivorship between joint tenants. Va. Code Ann. § 55-20 (1950). The succeeding section made the provision inapplicable where the joint tenants were executors or trustees, or where the tenor of the instrument made it clear that the interest of the deceased should belong to the survivor. Va. Code Ann. § 55-21 (1950). This saving provision had been held to apply to entireties as well as to joint tenancies, and an entirety arising thereby continued to have all its common-law incidents, including immunity from claims of the creditors of a single spouse.

⁵⁵ *Rowerdink v. Carothers*, 334 Mich. 454, 54 N.W.2d 715 (1952), criticized in 51 Mich. L. Rev. 756 (1953) (deed "to A and D, or survivor" held to create a life tenancy in common with fee remainder to the survivor); *Wright v. Smith*, 257 Ala. 665, 60 So.2d 688 (1952) (deed "to L and B, their heirs and assigns" with a subsequent clause providing that if either L or B died the entire estate should vest in the survivor in fee; held, deed created a tenancy in common in fee, without survivorship); *In re Trimble's Estate*, 57 N.M. 51, 253 P.2d 805 (1953); *Drazen, Tenancies—Joint or in Common*, 24 N.Y. State Bar Bull. 340 (1952).

⁵⁶ 102 F. Supp. 399 (S.D. Miss. 1952).

held (in a situation where the grantees were *not* husband and wife) that the above-quoted words created a joint tenancy.⁵⁷ The other one relied upon, *Sale v. Saunders*,⁵⁸ had declared "[t]he same words of conveyance which would make two other persons joint tenants will make the husband and wife tenants of the entirety," but (what the *Bird* court may have failed to notice) it did not involve a grant using the words "as joint tenants." The *Sale* case involved a conveyance to the wife's trustee and to the husband "for their joint use for life, remainder to the survivor." In New York an intermediate decision construed a deed whose introductory clause described the grantees as "C and L, his wife, F and S, his wife, as joint tenants."⁵⁹

The rule to be applied where one joint tenant⁶⁰ or tenant by the entirety⁶¹ murders,⁶² or otherwise feloniously kills, his fellow tenant came before the courts of several states during the last two years, none of which permitted the killer to benefit from his crime.⁶³ Note-writers commented on whether a joint tenancy was severed by an

⁵⁷ *Wolfe v. Wolfe*, 207 Miss. 480, 42 So.2d 438 (1949). Cf. *Collins v. Neal*, 107 Cal. App.2d 592, 237 P.2d 696 (1951) (conveyance "to A and B, husband and wife, as joint tenants" creates joint tenancy, the parties not being husband and wife). In *Donnelly v. Donnelly*, 84 A.2d 89 (Md. 1951), the deed running simply "to A and B his wife" created a tenancy in common because A's marriage to B later proved to be absolutely null.

⁵⁸ 24 Miss. 24, 35-36 (1852). Moreover, the quoted statement in this decision was dictum, merely a direct quote from Chancellor Kent.

⁵⁹ *Schwab v. Schwab*, 280 App. Div. 139, 112 N.Y.S.2d 354 (4th Dep't 1952).

⁶⁰ In *re King's Estate*, 261 Wis. 266, 52 N.W.2d 885 (1952) (husband committed suicide after murdering his wife, who was his joint tenant; majority opinion denied him any benefit by survivorship; upon his subsequent death, her heirs succeeded to the whole by virtue of her right of survivorship); *Vesey v. Vesey*, 237 Minn. 295, 54 N.W.2d 385 (1952), 32 B.U.L. Rev. 470 (1952), 28 Notre Dame Law. 286 (1953) (bank account held in joint tenancy by husband and wife; she feloniously killed him; constructive trust imposed on the entire bank account).

⁶¹ *Neiman v. Hurff*, 11 N.J. 55, 93 A.2d 345 (1952) (in tenancy by entirety, where husband murdered wife, husband holds the legal title in trust for wife's heirs, subject only to a lien in his favor for the computed value of half the net income from the property for the period of his own life expectancy at the date of the murder); *Colton v. Wade*, 80 A.2d 923 (Del. Ch. 1951), approved in Note, 9 Wash. & Lee L. Rev. 149 (1952); Recent Case, 37 Va. L. Rev. 1018 (1951). See also Recent Case, 4 U. of Fla. L. Rev. 273 (1951).

⁶² Comment, [1951] Wash. U.L.Q. 582 (murder by cotenant as affecting survivorship).

⁶³ Compare the admirable reasoning and desirable result reached in *Neiman v. Hurff*, 11 N.J. 55, 93 A.2d 345 (1952), with the tenable reasoning but undesirable result reached in *Bird v. Plunkett*, 139 Conn. 491, 95 A.2d 71 (1953) (manslaughter conviction did not prevent husband taking under his dead wife's will, since statute only forbade killer's taking property of his victim where "adjudged guilty of murder in the first or second degree"). Cf. *Prudential Ins. Co. v. Harrison*, 106 F.Supp. 419 (S.D. Cal. 1952) (involuntary manslaughter of wife by husband; wife's life insurance was community property; husband not allowed to take as named beneficiary, but is allowed to receive his half as community property).

interlocutory decree for partition,⁶⁴ a judgment sale from which the right to redeem still existed,⁶⁵ or the simultaneous deaths of the joint tenants.⁶⁶

In addition to the usual number of joint bank account cases,⁶⁷ there are two other joint tenancy decisions,⁶⁸ and two articles,⁶⁹ deserving mention.

Of the tenancy in common cases, the most important group dealt with the existence or effect of any fiduciary relationship arising between cotenants by virtue of their coholding. The Supreme Court of Mississippi reiterated its adherence to the view that, although one of two cotenants whose titles accrued under the same act or instrument could not buy up an outstanding adverse title and assert it to the exclusion of his cotenant, this principle did not apply where no confidential relation existed, where the parties' respective interests arose at different times under different instruments, and where the cotenant buying at foreclosure sale had not been under any obligation to discharge the encumbrance (although his estate was subject to it).⁷⁰ Another Mississippi case, urged as involving a confidential relation between cotenants, was properly disposed of as not presenting a cotenancy at all. The mother, owner in fee, had lost her land by tax sales, title under which had matured in the state before one of her children thereafter purchased the land from the state.⁷¹ In North Dakota an intestate mortgagor was survived by a widow and children, who thus became cotenants of his encumbered land. The mortgage was later foreclosed, and the statutory redemption period had fully

⁶⁴ Note, 31 Chi-Kent Rev. 270 (1953).

⁶⁵ Note, 30 Chi-Kent Rev. 189 (1952). Cf. *Eder v. Rothamel*, 95 A.2d 860 (Md. 1953) (death of judgment debtor before execution levied prevented judgment from severing joint tenancy; surviving joint tenant holds entire interest free of the judgment creditor).

⁶⁶ Note, 3 W. Res. L. Rev. 70 (1951).

⁶⁷ Of these, only two need be cited: *Kleemann v. Sheridan*, 75 Ariz. 311, 256 P.2d 553 (1953); *Block v. Bond*, 335 Mich. 118, 55 N.W.2d 756 (1952).

⁶⁸ *Connor v. Grosso*, 259 P.2d 435 (Cal. 1953) (that husband was her joint tenant did not render wife liable for cost of removing debris which husband dumped on plaintiff's land in preparing roadway over land of the joint tenancy); *Sanderfur v. Ganter*, 259 S.W.2d 15 (Ky. 1953).

⁶⁹ Comment, Joint Tenancy in Connecticut: A Proposed Statute, 27 Conn. B.J. 106 (1953) (discussing developments subsequent to those reported in 26 Conn. B.J. 427, 465, 470 [1952]); Nemmers, Wisconsin and Federal Taxation of Joint and Common Interests in Property, [1952] Wis. L. Rev. 91.

⁷⁰ *Dampier v. Polk*, 58 So.2d 44 (Miss. 1952). On the other hand, *Van Duzer v. Anderson*, 282 App. Div. 779, 123 N.Y.S.2d 46 (2d Dep't 1953), correctly held, in a tenancy in common arising by descent, that the cotenant in possession who defaulted in paying taxes and later bought at tax sales held title for the benefit of all the cotenants, not himself alone.

⁷¹ *Griggs v. Griggs*, 67 So.2d 450 (Miss. 1953).

expired as to all the cotenants but one, a son in military service whose right to redeem was extended under the Soldiers' and Sailors' Civil Relief Act. This son redeemed and claimed to hold the land free of his cotenants. The court held, however, that the right to redeem had expired as to all but his undivided interest, hence he could redeem only his interest, becoming co-owner with the foreclosure buyer.⁷²

Several courts of last resort applied the usual principles governing accounting and contribution between tenants in common.⁷³

Deeds.—Although constituting one of the three⁷⁴ property topics most frequently presented in reported decisions the past year, this topic was not particularly notable for its decisions, nor did it receive extensive attention in legal periodicals.⁷⁵ The validity of deeds was most frequently attacked for alleged lack of delivery. The courts again held that possession by the grantee of a completed deed is *prima facie* evidence of delivery,⁷⁶ but not conclusive;⁷⁷ that whether delivery of the deed to a third person constitutes delivery depends on the grantor's intent;⁷⁸ that a deed not intended to become effective until the grantor dies is invalid;⁷⁹ and that a deed otherwise presently

⁷² *Stevahn v. Meidinger*, 57 N.W.2d 1 (N.D. 1952).

⁷³ *E.g.*, *Gough v. Gough*, 329 Mass. 634, 109 N.E.2d 913 (1953). Cf. *Cohen v. Cohen*, 157 Ohio St. 503, 106 N.E.2d 77 (1952) (purporting to apply the Ohio statute as construed in an earlier decision, three judges dissenting). For a specialized application see *Lowe, Rights of Cotenants in Oil Leaseholds*, 6 Wyo. L.J. 237 (1952).

⁷⁴ The other two were adverse possession and easements.

⁷⁵ Several excellent articles appeared: *Barnes, The Origin of Private Titles in Louisiana: Federal and State Transfers of Land*, 27 Tulane L. Rev. 59 (1952); *Harris, Reservations in Favor of Strangers to the Title*, 6 Okla. L. Rev. 127 (1953); *Horner, The Lease and Release*, 5 Baylor L. Rev. 223 (1953) (duty of holder of expired "unless" or "or" oil and gas lease to execute a release to remove the cloud on the lessor's record title); *Keith, Government Land Surveys and Related Problems*, 38 Iowa L. Rev. 86 (1952); *Means, Words of Inheritance in Deeds of Land in South Carolina: A Title Examiner's Guide*, 5 S.C.L.Q. 313 (1953); *Comment*, 51 Mich. L. Rev. 1053 (1953) (constitutionality of state legislation affecting capacity of aliens to acquire and hold land).

⁷⁶ *Enright v. Bannister*, 195 Va. 76, 77 S.E.2d 377 (1953).

⁷⁷ *Waters v. Blockson*, 57 N.M. 368, 258 P.2d 1135 (1953) (affirmed a finding of no delivery, the deed having been found in the grantor's possession at death, although allegedly having twice been in grantee's possession). Cf. *Holt v. Werbe*, 198 F.2d 910 (8th Cir. 1952) (deed void under Arkansas law as undelivered, although mailed to grantee for examination).

⁷⁸ *Hooker v. Tucker*, 335 Mich. 429, 56 N.W.2d 246 (1953) (no delivery); *Stoops v. Stoops*, 259 S.W.2d 833 (Mo. 1953) (owners by entireties joined in a conveyance to a third person who agreed to reconvey to the husband whenever requested by the husband; husband recorded and retained this deed; wife later obtained divorce; third person conveyed to the ex-husband; delivery of both deeds sustained); *Calcutt v. Gaylord*, 415 Ill. 390, 114 N.E.2d 340 (1953) (affirmed a finding of valid delivery of a deed the grantor had left with his own attorney despite the fact that grantor later tore up the deed and that his attorney testified that the grantor had originally expressed a desire to be able to revoke).

⁷⁹ *Claunch v. Whyte*, 73 Idaho 243, 249 P.2d 915 (1952) (gratuitous manual

operative is not invalidated by a reservation in the grantor of a life estate⁸⁰ or a life estate coupled with a power.⁸¹ Two decisions of particular interest affirmed judgments sustaining the validity of deeds delivered by a parent to his child, although in one case the deed was unrecorded and had been kept in the safe-deposit box which father and daughter jointly shared,⁸² and in both cases the grantor remained in possession of the land until his death.⁸³

The usual crop of cases involving alleged undue influence, frequently coupled with allegations of lack of mental capacity or other defenses, require no comment, and only passing attention is required by the decisions concerning the description of the grantee⁸⁴ or of the premises conveyed.⁸⁵

Of several decisions involving conflicts between the granting and habendum clauses, the Alabama decision of *Green v. Jones*⁸⁶ merits special notice. It affirms a holding that a fee simple was conveyed to Alice by a deed whose granting clause used no words of fee or inheritance, whose habendum read "to Alice for life and upon her

delivery to grantee, with grantor stating that if anything happened to her while on a projected trip, the grantee should have the land; evidence indicated that the grantor intended to be able to take the deed back if she wished).

⁸⁰ *Thuet v. Thuet*, 260 P.2d 604 (Colo. 1953). The grantor handed the deed to a bank, accompanied by a letter reciting that the deed was to have present effect and be irrevocable, but delivery to the named grantee was to be made at the grantor's death. The validity of the deed was upheld, although the grantee-daughter learned of the deed only hours before the grantor died. A life estate was effectually reserved in the grantor though not mentioned in the deed, the accompanying letter specifying that he was to have the privilege of life occupancy. To the same effect see *Brevdy v. Singer*, 259 P.2d 1087 (Wyo. 1953). Cf. *Kelley v. Kelley*, 335 Mich. 401, 56 N.W.2d 235 (1953); *Berrigan v. Berrigan*, 413 Ill. 204, 108 N.E.2d 438 (1952).

⁸¹ *St. Louis County Nat. Bank v. Fielder*, 260 S.W.2d 483 (Mo. 1953).

⁸² *Herzing v. Hess*, 263 Wis. 617, 58 N.W.2d 430 (1953).

⁸³ *Fisher v. Pugh*, 261 P.2d 181 (Okla. 1953). On the need for acceptance by the grantee see 32 Ore. L. Rev. 262 (1953).

⁸⁴ *Luttrell v. Potts*, 257 S.W.2d 542 (Ky. 1953) (conveyance to named persons "as trustees of the Church of Christ," deed specifying that the land be used "for the benefit of the Church of Christ"; held to entitle thereto the named church, and not the Christian Church, although both had used the premises subsequent to the conveyance). See 51 Mich. L. Rev. 756 (1953) (effect of deed "to A and B, or survivor").

⁸⁵ *Lyon v. Parkinson*, 113 N.E.2d 861 (Mass. 1953) (corrected obvious error of call for "Southwest" where "Southeast" was necessary in order to reach monument called for, distance called for being also consistent only with "Southeast"); *Powell v. Mills*, 237 N.C. 582, 75 S.E.2d 759 (1953) (deed inoperative as color of title or as fixing known boundaries for claim of actual adverse possession, where its description defectively called "thence south 30 deg. east to the back line" without designating what back line was intended, extrinsic evidence not remedying the uncertainty); *Harris v. Swart Mortgage Co.*, 41 Wash.2d 354, 249 P.2d 403 (1953); *Lewis v. Bowen*, 209 Ga. 717, 75 S.E.2d 422 (1953) (deed upheld where description stated state, county, district, and names of adjoiners on north, south, east and west).

⁸⁶ 257 Ala. 683, 60 So.2d 857 (1952), noted disapprovingly in 5 Ala. L. Rev. 328 (1953).

death to Lee [and his] heirs and assigns forever," and whose subsequent covenant clauses ran "to Alice her heirs and assigns forever." The court applied the rule that the granting clause having conveyed a fee simple, the habendum could not cut it down. The covenant clause was invoked as a makeweight argument. Concededly the Alabama statutes have abrogated the requirement of words of inheritance for the creation of a fee and have substituted a rule that a fee passes unless it clearly appears that a lesser estate was intended. The habendum clause, however, might be interpreted as precisely stating such an intention, and words of inheritance in the covenant clause are usually given far less importance than the instant decision accorded them. Where words of inheritance are required, their presence in the covenant clause will not suffice. Except for cases of open ambiguity as to the estate intended to be granted, such words in the covenant clause are given no consideration at all in deciding what estate passed. The instant decision, therefore, seems to place Alabama in the minority view as to the effect of the instrument in issue.⁸⁷

A slightly different deed confronted the Supreme Court of North Carolina in *Whitson v. Barnett*.⁸⁸ After first describing the grantee as "Roy Whitson and his Bodily heirs" in the premises, the deed read "to Roy Whitson and Bodily heirs, and their heirs and assigns" in the granting and warranty clauses, and "to Roy Whitson and Bodily heirs and assigns" in the habendum. Conceding that had the deed read simply "to Roy Whitson and his bodily heirs" it would have created a fee under North Carolina statutes and decisions, and that this same result would obtain if the expression "Roy Whitson and Bodily heirs, and their heirs and assigns" had used the words "Bodily heirs" as technical words of limitation, referring to the entire line of heirs of the first taker, the court held that "Bodily heirs" was actually used to refer to Roy's own children, hence the Rule in Shelley's Case was inapplicable, and Roy received a life estate with a remainder in fee in his children.⁸⁹

Several decisions involved conveyances of fees determinable or

⁸⁷ Cf. 1 Walsh, Commentaries § 84 n.13 and related text (1947); 2 id. § 205 n.7 and related text; 4 Tiffany, Real Property § 980. Compare *Rose v. Cook*, 207 Okla. 582, 250 P.2d 848 (1952) (warranty deed, whose warranty clause excepted one-half the mineral interest, did not reserve any part of minerals), with *Born v. Bentley*, 207 Okla. 21, 246 P.2d 738 (1952), 6 Okla. L. Rev. 217 (1953).

⁸⁸ 237 N.C. 483, 75 S.E.2d 391 (1953).

⁸⁹ Similarly, *Sutton v. Sutton*, 236 N.C. 495, 73 S.E.2d 157 (1952), held that a devise to testator's sons equally, with a proviso that if any son die "without lawful heirs" his share should go to the survivors, used the quoted words as meaning "without lawful issue" him surviving. See also 5 Ala. L. Rev. 330 (1953) (Shelley's Rule applied in 1952 Texas case).

on condition subsequent,⁹⁰ or subject to a conditional limitation,⁹¹ or conveyances "on condition" which were construed to be merely covenants.⁹²

Other developments included a Kentucky decision that where the description contained in the original deed varied from that contained in the certified recorded copy of that deed, the provisions of the original deed prevailed;⁹³ a Kansas aside concerning good consideration;⁹⁴ and a note on the sufficiency of certificates of acknowledgments.⁹⁵

Gifts.—An examination of twenty-eight decisions from twenty-one jurisdictions, including those of fifteen courts of last resort, disclosed no startling developments. One group of cases followed the prevailing view that federal treasury regulations prevent the transfer of United States Savings Bonds by either a gift causa mortis⁹⁶ or

⁹⁰ Board v. Nevada School Dist., 363 Mo. 328, 251 S.W.2d 20 (1952) (evidence insufficient to show that school board had both ceased to use and in addition had abandoned the premises for school purposes; moreover, when and if such abandonment occurs, school district shall be allowed to remove its improvements, absent showing that such removal would injure the freehold).

⁹¹ Roadcap v. County School Board of Rockingham County, 194 Va. 201, 72 S.E.2d 250 (1952).

⁹² Coleman v. Layman, 41 Wash.2d 753, 252 P.2d 244 (1953); Klick v. Fearing, 55 N.W.2d 594 (Minn. 1952); Clark v. Grand Rapids, 334 Mich. 646, 55 N.W.2d 137 (1952). The subject matter of this and the two immediately preceding notes is primarily covered in Future Interests, p. 641 *infra*.

⁹³ Reese v. Black Star Coal Corp., 254 S.W.2d 331 (Ky. 1953). There was no suggestion that the original deed had been altered. Cf. Pope v. Kirk, 255 S.W.2d 468 (Ky. 1953), where a deed written in ink and conveying a fee simple to a grandmother was duly delivered but, prior to recording, was altered by the scrivener at the grantee's request, by penciling in the words "and her grandchildren at her death." The grantor apparently never re-executed the deed or assented to the change. If given effect, the altered language gave the grandmother a life estate, remainder in fee to her grandchildren. Distinguishing its own decision concerning an altered oil and gas lease, the court held that the alteration did not vitiate the deed or have any direct legal effect, but found an equitable estoppel arising from conduct of the grandmother. An alteration of the original deed subsequent to its recording is obviously ineffective to reduce the estate previously given, even though the altered deed is rerecorded. Hansen v. Walker, 175 Kan. 121, 259 P.2d 242 (1953). Cf. Godding v. Swanson, 173 Pa. Super. 575, 98 A.2d 210 (1953).

⁹⁴ Hansen v. Walker, 175 Kan. 121, 259 P.2d 242 (1953), in affirming a judgment upholding a deed as against the contention that it was without consideration and had not been delivered or accepted, upheld the deed as a gift after first stating: "The deed recited a consideration of \$1, love and affection. The evidence disclosed that there was great affection between the plaintiff and defendant at all times. . . ."

⁹⁵ Note, 25 A.L.R.2d 1124 (1952).

⁹⁶ Nelson v. Wheeler, 256 P.2d 1080 (Mont. 1953) (Series E bonds); Connell v. Bauer, 61 N.W.2d 177 (Minn. 1953) (Series E bonds; extensive quotation of Treasury regulations; both gifts causa mortis and gifts inter vivos declared invalid). On the contrary, In re Presender's Estate, 125 N.Y.S.2d 83 (Surr. Ct. 1953), unaccountably held that United States Savings Bonds could be the subject of a valid gift causa mortis. As authority the court cited a 1942 New York trial court decision, ignoring such subsequent contrary decisions as Gans v. Gans, 277 App. Div. 903, 98 N.Y.S.2d 466 (2d Dep't 1950), and In re Nettle's Estate, 276 App. Div. 929, 94 N.Y.S.2d 704 (2d Dep't 1950).

inter vivos,⁹⁷ except in strict compliance with such regulations. Another decision, in no way inconsistent, upheld a gift of such savings bonds where the donor had registered them in the donee's name.⁹⁸

Comment is merited by two other decisions involving alleged gifts causa mortis. In one, the Supreme Court of Pennsylvania, in an opinion reviewing both the testimony and the Pennsylvania decisions, affirmed a judgment which upheld a jury verdict in favor of an alleged gift causa mortis of certain stock certificates.⁹⁹ In the other, a seriously ill elderly lady, while en route to the hospital in the car of a visiting nurse who had been assigned to visit her periodically by the Catholic Charities Bureau, handed a small package to the nurse and said, "I give this box to you and if I die it is yours. I don't want anyone else to have it." The nurse deposited the box unopened in the office of the Bureau director. The donor died within a few weeks, without having recovered from her illness. The box was later opened and found to contain \$11,577 in cash. The nurse, after having temporarily turned over the money to the donor's executor, sought to recover it as a gift causa mortis. The trial court held against the gift, and the intermediate Indiana court affirmed that judgment as supported by the evidence.¹⁰⁰ The Supreme Court of Indiana, although mustering a majority in favor of transferring the cause to its court, found itself evenly divided on whether to affirm or reverse the trial court. Accordingly, it affirmed,¹⁰¹ creating a judgment, but not a "doctrine" that the uncontradicted and uncorroborated testimony of the donee is insufficient to establish a gift causa mortis.¹⁰²

⁹⁷ *Collins v. Jordan*, 110 N.E.2d 825 (Ohio C.P. 1949), held that Series G savings bonds could not be transferred by gift inter vivos and that the evidence failed to show a gift causa mortis. (This opinion did not appear in *Northeastern Reporter* until 1953 and then appeared with a supplemental opinion and opinion on denial of motion for new trial. The 1949 date is obviously inapplicable to the latter opinions, as they refer to a decision of mid-1950. An attempted appeal, dismissed as not timely taken, *Collins v. Jordan*, 113 N.E.2d 911 [Ohio App. 1952], indicates that the lower court judgments were rendered in 1951.)

⁹⁸ *Arizona Title Guarantee & Trust Co. v. Wagner*, 75 Ariz. 82, 251 P.2d 897 (1952). The action was to establish ownership of school district bearer bonds found in a decedent's safe-deposit box. A stepdaughter asserted ownership of such bonds, not by direct gift, but because they were purchased for her by the decedent with her own money, which money was the proceeds of Series E bonds which the decedent had given her (registering them in her name) and which she had endorsed and cashed, her Treasury check therefor having been deposited in the decedent's bank account, and a check drawn by him in buying the school bonds.

⁹⁹ *Titusville Trust Co. v. Johnson*, 100 A.2d 93 (Pa. 1953).

¹⁰⁰ *In re Collinson's Estate*, 93 N.E.2d 207, petition for rehearing denied, 94 N.E.2d 485 (Ind. App. 1950).

¹⁰¹ *In re Collinson's Estate*, 106 N.E.2d 225 (Ind. 1952), supplementary opinion, 108 N.E.2d 700 (Ind. 1952).

¹⁰² *Id.* Note, 2 De Paul L. Rev. 306 (1953) ("The Supreme Court of Indiana, in an evenly divided decision, held that it was contrary to public policy to permit an alleged

A factually intriguing case, reading like a rejected movie script, arose in California where an alleged gold digger insinuated herself into the affections of a lonely widower and, under a promise of marriage, painlessly extracted from him while he was anaesthetized by love his house,¹⁰³ an automobile, a sewing machine, rings, clothes, silverware and money. After having substantially "cleaned" him¹⁰⁴ she allegedly repudiated the marriage promise. A judgment restoring to him everything except certain luggage, perfumes, clothing and money deemed to have been absolute gifts,¹⁰⁵ was affirmed on appeal.¹⁰⁶ The decision was based on the California engagement-gift statute.¹⁰⁷

*Liens.*¹⁰⁸—Questions continue to arise concerning the right of the artisan to his lien, both at common law and under statutes, and both as against his bailor and as against third persons having a title to or lien against the same res.

In Montana, which allows a statutory agister's lien to a ranchman to whom cattle "are intrusted" under an express or implied contract for their keeping, feeding or pasturing, a cattle owner pastured his own herd of cattle on another's land, agreeing to pay therefor at a stated rate. After the pasturage contract expired, the cattle owner removed all of his cattle that could be found, making no agreement with the landowner as to those missing. The pasturage bill was not paid. Subsequently, the landowner discovered on his land six of the missing cattle, retaining them under a claim of lien for pasturage of the entire herd. In affirming a denial of lien, the court pointed out that the herd of cattle had not been "intrusted" to (left in the possession of) the landowner, and no agreement made concerning care of the lost cattle.¹⁰⁹

gift causa mortis to be proved on the sole uncorroborated testimony of the alleged donee,").

¹⁰³ The realty was given by formal deed, not orally. For two current cases enforcing oral gifts of land under the doctrine of "part performance" (taking possession and making valuable improvements), see *Sharpton v. Givens*, 209 Ga. 868, 76 S.E.2d 806 (1953); *Jaworski v. Jaworski*, 95 A.2d 95 (Md. 1953).

¹⁰⁴ He also gave her a new vacuum cleaner.

¹⁰⁵ Some of these gifts occurred prior to their becoming engaged.

¹⁰⁶ *Stienback v. Halsey*, 115 Cal. App.2d 213, 251 P.2d 1008 (1953).

¹⁰⁷ Cal. Civ. Code § 1590 (Deering 1949): "Where either party to a contemplated marriage in this State makes a gift of money or property to the other on the basis or assumption that the marriage will take place, in the event that the donee refuses to enter into the marriage as contemplated or that it is given up by mutual consent, the donor may recover such gift or such part of its value as may, under all of the circumstances of the case, be found by a court or jury to be just."

¹⁰⁸ The present topic does not include questions of tax liens (see *Anderson, Federal Tax Liens—Their Nature and Priority*, 41 Calif. L. Rev. 241 [1953]; *Dutt v. Marion Air Conditioning Sales, Inc.*, 159 Ohio St. 290, 112 N.E.2d 32 [1953]), liens arising by attachment or judgment, mechanics' liens, or the lien of the conditional vendor or chattel mortgagee.

¹⁰⁹ *Engle v. Pfister*, 257 P.2d 561 (Mont. 1953).

The Supreme Court of Tennessee held that a chattel mortgage on an automobile was prior in right to a garageman's common-law lien incurred subsequent to the prompt recording (and noting on the title certificate) of the chattel mortgage.¹¹⁰ The lower court had given priority to the garageman's lien, in the belief that the following language of the recordation statute prevented such recordation being constructive notice to common-law lienors:

such filing and the notation of the [chattel mortgage] lien or encumbrance upon the certificate of title . . . shall constitute constructive notice of all liens and encumbrances against the vehicle described therein to creditors of the owner, to subsequent purchasers and encumbrances *except such liens as may be authorized by law dependent upon possession.*¹¹¹ (Emphasis supplied.)

On appeal, however, the language above emphasized was declared to relate to the earlier phrase, "notice of all liens,"¹¹² with the result that the statute was exempting possessory liens from the necessity of being filed (possession being itself a constructive notice), but not excepting them from the effect of the recordation of other types of liens.

An Ohio trial court, discovering a lack of authority on the precise point, correctly held that the Ohio certificate-of-title law, similarly providing for noting of liens on the title certificate but failing to mention artisans' liens, did not abrogate the common-law artisan's lien; hence a garageman retaining possession of an automobile would have a lien thereon for his repairs, as against the owner authorizing such repairs.¹¹³

A Fruehauf trailer, being drawn down the highway by a truck-tractor to which it was securely connected, was held to be, together with the tractor, a "motor vehicle" within the South Carolina statute¹¹⁴ allowing a lien on a motor vehicle in favor of persons injured or damaged through the negligent or reckless operation of such motor vehicle.¹¹⁵ The trailer and truck-tractor had been sold together under an attach-

¹¹⁰ City Finance Co. v. Perry, 257 S.W.2d 1 (Tenn. 1953).

¹¹¹ Tenn. Pub. Acts 1951, c. 70, § 69(a); Tenn. Code Ann. § 5538.169 (Williams Supp. 1952). The last word preceding the italics should read *encumbrancers* but is printed *encumbrances* in all the sources above cited. See also *id.* § 5538.168.

¹¹² I.e., the court interprets the statute to read "such filing and the notation of the lien or encumbrance upon the certificate of title . . . shall constitute constructive notice of all liens and encumbrances, except such liens as may be authorized by law dependent upon possession, against the vehicle described therein to creditors of the owner, to subsequent purchasers and encumbrances [sic]." City Finance Co. v. Perry, 257 S.W.2d 1, 3 (Tenn. 1953).

¹¹³ Justice v. Bussard, 114 N.E.2d 305 (Ohio Munic. Ct. 1953).

¹¹⁴ S.C. Code § 45-551 (1952).

¹¹⁵ Fruehauf Trailer Co. v. South Carolina Elec. & Gas Co., 223 S.C. 320, 75 S.E.2d 688 (1953).

ment obtained pursuant to the lien statute by a collision victim, and the conditional vendor of the trailer vainly pointed out that the trailer was motorless and was by statute separately licensed from the truck-tractor.

An interesting Oregon case involved the scope of that state's statutory logger's lien granted to "every person performing labor upon or [assisting] in obtaining or securing sawlogs . . . or other timbers." The plaintiff asserted a lien for his services as a scaler¹¹⁶ and as a watchman, both services having been rendered at the company millpond. In affirming a judgment which sustained a demurer to the complaint, the Supreme Court of Oregon held that service as a scaler did not come within the statute.¹¹⁷ Accordingly, even if watchman service entitled him to a lien, the plaintiff's complaint was defective for commingling that claim with the nonlienable claim for scaling. As another ground for its affirmance, the court held that neither the plaintiff's scaling nor acting as watchman entitled him to a lien. Invoking the language of the title of the original Oregon enactment of the statute, "An Act to Protect Laborers in Timber and Logging Camps," the court emphasized that both services plaintiff rendered were performed while the logs were stored in a millpond, not at a lumber camp. Additional support for the argument that the statute was meant to apply only to services rendered in such camps, is found in the provision of the same statutory section that "[t]he cook in a logging, or other camp . . . maintained for obtaining or securing sawlogs . . . shall be regarded as a person who assists in obtaining or securing the sawlogs. . . ."¹¹⁸

Of somewhat lesser interest was a Vermont decision that the warehouseman's lien specified in the Uniform Warehouse Receipts Act did not extend to an operator of tourist camps who by special agreement with the owner of certain personalty had undertaken to store it in his residence and in fact stored it in one of his adjacent overnight cabins. This isolated "storing goods for profit" was held not to constitute being "engaged in the business of storing goods for profit" within the statutory definition of warehouseman.¹¹⁹

¹¹⁶ An expert employed to determine the number of board feet, and per cent of unsound timber, in a quantity of logs or standing timber.

¹¹⁷ *Kidder v. Nekoma Lumber Co.*, 249 P.2d 754 (Ore. 1952). The court deemed it obvious that scaling did not constitute assistance "in obtaining or securing sawlogs" and quoted a Washington decision that scaling did not constitute "performing labor upon" logs. As the Oregon statute was borrowed from Washington, the court accorded great weight to the Washington decision. (The Washington decision, however, did not antedate Oregon's adoption of the statute.)

¹¹⁸ Ore. Comp. Laws Ann. § 67-1301 (1940).

¹¹⁹ *Hackel v. Burroughs*, 117 Vt. 306, 91 A.2d 703 (1952). Although the opinion is not entirely clear as to the facts, it would appear that the corporate owner originally

Another decision¹²⁰ and two notes¹²¹ are footnoteworthy.

*Marital Estates.*¹²²—Anachronism or not, curtesy still exists in several states.¹²³ It figured decisively in a legal battle between Kentucky in-laws which culminated in *Reynolds v. McGuire*,¹²⁴ decided by the Court of Appeals of Kentucky in the last weeks of 1952. The intestate, owner of a thirty-five-acre tract, was survived by four children, of whom one was the plaintiff's wife. The first child (heir) conveyed his interest to the second. Later, pursuant to an agreement to partition, the second and third children (heirs) conveyed in fee a ten-acre part of the tract to plaintiff and his wife, and plaintiff and wife executed deeds for the other twenty-five acres to the second and third children. The plaintiff's wife died three years later, and a few months thereafter there were recorded two deeds, each purporting to be the sole genuine conveyance of the ten-acre strip. The first to be recorded named only the wife of plaintiff as grantee. The second named both plaintiff and wife, and had a survivorship clause. Without disputing the jury finding that the latter was the genuine instrument, the appellate court reversed the lower court judgment that plaintiff had become by survivorship the owner of the ten-acre strip. Relying on the rule that where heirs exchange partition deeds whereby each becomes owner of a part in severalty, no new title is created, the heirs' title remaining one derived by inheritance rather than by inter vivos

stored the goods with this lien claimant, then became bankrupt; thereafter his trustee in bankruptcy entered into an agreement whereby the lien claimant should continue to store these goods at a stated monthly charge. Subsequently, the claimant refused to permit the trustee to take the goods until paid "a balance claimed due for storage"—presumably for storage prior to the bankruptcy.

¹²⁰ *Smith v. Baumann*, 75 Ariz. 205, 254 P.2d 802 (1953). P, who was gambling with D and others, borrowed \$180 from D in order to continue in the game, and handed to D the keys of P's car, as security for the loan. D retained the car and, after P had taken it away without permission, surreptitiously regained possession. In affirming a judgment that the car be restored to P, the court held inapplicable the rule denying relief where parties were in pari delicto, since P could establish his right to possession by relying on his title, without reference to the gambling transaction.

¹²¹ Recent Case, 41 Geo. L.J. 266 (1953), approving a decision compelling a warehouseman who was asserting a lien to surrender the res to the owner upon the latter's depositing in court a sum sufficient to pay the warehouseman's claim (if such claim were later upheld), where the owner would suffer great loss if not given immediate possession of the res. See also Note, Bailee's Lien for Work on Goods as Extending to Other Goods of the Bailor in His Possession, 25 A.L.R.2d 1030, 1037 (1952), which states that the majority view allows the lien on all the goods received under the same contract, although services have been performed only as to part of the goods, but excepts from this rule any dies or implements which the customer supplied to be used in performing the services on other goods.

¹²² Day, Rights Accruing to a Husband upon Marriage with Respect to the Property of His Wife, 51 Mich. L. Rev. 863 (1953).

¹²³ For recent compilations of statutes modifying curtesy see 2 Powell, Real Property § 218 (1950); 1 American Law of Property §§ 5.66-5.73 (Casner ed. 1952).

¹²⁴ 253 S.W.2d 386 (Ky. 1952).

deed,¹²⁵ the high court held that plaintiff was entitled solely to an estate by curtesy (in Kentucky, a life interest in one-third) in the land partitioned to his wife. The fact that plaintiff had taken possession of the entire ten-acre strip upon his wife's death did not estop him from asserting his right of curtesy.

Concerning dower, the decisions¹²⁶ are probably of less interest than the current articles and notes.¹²⁷

Restrictive Covenants.—Unquestionably the most important single development of the year concerning restrictive covenants was the decision by the Supreme Court clarifying the judgment it had rendered in *Shelley v. Kraemer*¹²⁸ five years before. Prior to May 3, 1948, it seemed clear in most jurisdictions that valid reciprocal deed covenants against conveying land to (or at least against use and occupancy by) non-Caucasians were enforceable by injunction against both the breaching covenantor-grantor and his grantee or intended grantee. On that date, however, the Supreme Court held that the equal protection clause of the Fourteenth Amendment prevented state courts from enjoining Negroes from occupying such restricted land. The Court did not in terms limit its holding so precisely, but it happened that both of the suits actually decided by the Court in that one decision did involve state court injunctions against Negro buyers. Mr. Chief Justice Vinson, speaking for a unanimous court of six justices, said:

We conclude, therefore, that the restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State and the provisions of the Amendment have not been violated.¹²⁹

Despite some uncertainty,¹³⁰ the general opinion was that the Court

¹²⁵ *Id.* at 387, citing Note, 132 A.L.R. 637 (1941), which collected decisions to the effect that tenancy by the entirety could not arise from a partition deed to one heir and her husband, unity of title being lacking. Accord, Note, 173 A.L.R. 1218 (1948). But see 2 American Law of Property § 6.20 (Casner ed. 1952).

¹²⁶ *Resch v. Rowland*, 257 S.W.2d 621 (Mo. 1953); *Purvis v. Ennis*, 258 Ala. 174, 61 So.2d 451 (1952).

¹²⁷ *Hayes, Illinois Dower and the Illusory Trust: The New York Influence*, 2 De Paul L. Rev. 1 (1952); Recent cases, 22 U. of Cin. L. Rev. 253 (1953) (inchoate dower barred by divorce), 5 U. of Fla. L. Rev. 335 (1952) (nonliability of dower for federal estate tax under Florida apportionment statute). See also Note, 25 A.L.R.2d 333 (1952) (dower or curtesy in defensible fees).

¹²⁸ 334 U.S. 1 (1948), noted in 1948 Annual Surv. Am. L. 679.

¹²⁹ *Id.* at 13.

¹³⁰ See Smout, *An Inquiry into the Law on Racial and Religious Restraints on Alienation*, 30 Can. B. Rev. 863 (1952) (United States and Canadian cases); Recent Case, 25 Rocky Mt. L. Rev. 112 (1952).

intended its rule to apply not only to covenants based on race or color, but also to those based on religion¹³¹ or national origin; not only to injunctions in equity but also to suits at law for damages;¹³² and not only to legal and equitable proceedings against Negro buyers but also to such proceedings against Caucasian covenantors-grantors.¹³³ In 1950, the problem of the scope of the decision was squarely raised in California where one of several landowners who had entered into a reciprocal restrictive covenant against use or occupancy "by any person not wholly of the white or Caucasian race," knowingly conveyed his lot thereafter with the intention and effect that it become occupied by non-Caucasians. The other covenantors sued the breaching covenantor for damages, alleging depreciation of their own lots in consequence of the breach. The trial court sustained a demurrer to the complaint. Unconvinced, the plaintiffs appealed, only to have the California district court of appeal unanimously affirm in a carefully documented opinion.¹³⁴ The California Supreme Court having refused to hear the cause¹³⁵ the plaintiffs sought and obtained certiorari from the Supreme Court of the United States, where the district court of appeal judgment was finally affirmed.¹³⁶ The majority opinion squarely held that the awarding of damages against the breaching Caucasian covenantor would be state action impairing the constitutional rights of the latter's non-Caucasian grantees or prospective or potential grantees. Moreover, the Court held that the defendant covenantor had standing to raise this constitutional question, although not himself of the class whose rights were being infringed.¹³⁷ The language above quoted from *Shelley v. Kraemer* was quoted with re-

¹³¹ The Department of Justice announced that it construed the decision as applicable to covenants based on "creed." N.Y. Daily News, May 5, 1948, p. 30.

¹³² *Roberts v. Curtis*, 93 F. Supp. 604 (D.D.C. 1950); *Phillips v. Naff*, 332 Mich. 389, 52 N.W.2d 158 (1952). But see *Weiss v. Leason*, 359 Mo. 1054, 225 S.W.2d 127 (1949), that damages could not be awarded against the Negro grantee but might possibly be allowable against the breaching covenantor-grantor. The latter case was generally criticized.

¹³³ This view was apparently taken in *Kemp v. Rubin*, 298 N.Y. 590, 81 N.E.2d 325 (1948), the court citing *Shelley v. Kraemer* without comment and reversing without opinion the lower courts which had enjoined not only the Negro vendee but also the Caucasian covenantor-vendor. See also *Corrigan v. Buckley*, 271 U.S. 323 (1926), in which the Caucasian vendor was enjoined.

¹³⁴ *Barrows v. Jackson*, 112 Cal. App.2d 534, 247 P.2d 99 (1952).

¹³⁵ Three justices dissenting. *Id.* at 555, 247 P.2d at 113.

¹³⁶ *Barrows v. Jackson*, 346 U.S. 249 (1953), noted approvingly, 67 Harv. L. Rev. 105, 102 U. of Pa. L. Rev. 134 ("justifiable" but "ignores certain policies which justify rules of standing"); 39 A.B.A.J. 1093 (1953); 48 N.U.L. Rev. 495 (1953).

¹³⁷ *Id.* at 257. "Under the peculiar circumstances of this case, we believe the reasons which underlie our rule denying standing to raise another's rights, which is only a rule of practice, are outweighed by the need to protect the fundamental rights which would be denied by permitting the damages action to be maintained."

liance in the majority opinion, and cited in the lone dissent of its original author, the late Chief Justice Vinson, who complained feelingly that "[t]he majority seems to recognize, albeit ignore, a proposition which I thought was made plain in the *Shelley* case."¹³⁸

This latest Supreme Court decision has settled some, but not all, of the existing questions concerning the scope of *Shelley v. Kraemer*. Although the majority opinion mentioned *Correll v. Earley*¹³⁹ as one of the conflicting state decisions which prompted the Court to grant certiorari in the instant case, the majority opinion does not specifically deal with the question of whether the Constitution forbids a state court to entertain a suit for damages for *conspiracy to violate* such a covenant. Several other questions remain open in varying degrees.

The related problem of racial restrictive covenants in cemeteries was brought forcibly to public attention when an American soldier killed in Korea was denied burial in a private cemetery in Iowa. The lot-purchase contracts specified that the privilege of burial should accrue "only to members of the Caucasian race." The soldier was eleven-sixteenths Winnebago Indian. His remains were later buried in Arlington National Cemetery, and his widow thereafter brought suit against the Iowa cemetery corporation.¹⁴⁰ The Supreme Court of Iowa, in denying recovery, held that the soldier was as a matter of law not a member of the Caucasian race, that *Shelley v. Kraemer* was distinguishable since the cemetery corporation had not brought any action or sought any injunctive relief or damages and that no prohibited "state action" was involved where a state court merely declined to invalidate the covenant and award damages against the defendant for having insisted that the covenant be observed.¹⁴¹

¹³⁸ Id. at 261. The dissent urges not only that *Shelley v. Kraemer* is distinguishable, and this case beyond the language of that opinion, but also that the instant defendant had no standing to raise the constitutional question and therefore the Court had no power to deal with it.

¹³⁹ 205 Okla. 366, 237 P.2d 1017 (1951), 1 Buff. L. Rev. 304 (1952); 31 Neb. L. Rev. 616 (1952); 24 Rocky Mt. L. Rev. 380 (1952); 100 U. of Pa. L. Rev. 1049 (1952); 5 Vand. L. Rev. 634 (1952); 38 Va. L. Rev. 389 (1952). See also the discussion of this case in Bennett, *Conspiracy to Induce Breach of Restrictive Racial Covenants*, 2 Kan. L. Rev. 86 (1953). "It is not out of line to suggest that while the covenantees have a right to break the contract, still they have the additional right against malicious interference with that contract from strangers." Id. at 91.

¹⁴⁰ *Rice v. Sioux City Memorial Park Cemetery*, 102 F. Supp. 658 (N.D. Iowa 1952). Suit was originally brought in the state court, and was removed by the defendant to federal court, which remanded it to the state court because of serious doubt that federal court jurisdiction existed.

¹⁴¹ *Rice v. Sioux City Memorial Park Cemetery*, 60 N.W.2d 110 (Iowa 1953). The court also held that the United Nations Charter had no application; that the Iowa civil-rights law as it existed at the time of the acts complained of did not apply to cemeteries, although a 1953 amendment broadened the law to include private ceme-

The usual number of reported cases involved variously worded covenants designed to restrict occupancy to single-family detached residential use.¹⁴² One court of last resort held that a common-plan covenant prohibiting construction other than "for private residence purposes" must be construed as forbidding the erection of a duplex (two-family house).¹⁴³ Another court affirmed a ruling that as a matter of law a covenant prohibiting the erection of, or use as, an "apartment house or two-family dwelling," was not violated by a residence owner who, having first improved the basement for use by his growing son, later rented it out to a man as a basement bedroom, and rented out an attic room to a lady who paid rent except when acting as caretaker during months the family was away.¹⁴⁴ The Court of Appeals of Kentucky, reiterating its position that the rule of strict construction is not to be applied to unambiguous building restrictions, held that subdivision covenants that no dwellings in the area should cost less than \$6,000 except within 200 feet of a named intersection,

teries other than those of church and fraternal groups; and that the trial court did not err in dismissing the action instead of letting it go to the jury. The new statute, Iowa Acts 1953, c. 84, after first exempting from its operation "churches . . . established fraternal societies, or incorporated cities, or towns or other political subdivisions . . . of Iowa" (Section 1) makes it unlawful for any other private cemetery organization "to deny the privilege of interment . . . solely because of the race or color of such deceased person. Any contract, agreement, deed, covenant, restriction or charter provision . . . entered into . . . either subsequent or prior to the effective date of this chapter, authorizing, permitting, or requiring any [such] organization . . . to deny such privilege of interment because of race or color of such deceased person is hereby declared to be null and void and in conflict with the public policy of this state." Section 8. Criminal penalties for violation of the statute are prescribed. Section 9. The statute invites various conjectures, including the effect of the word "established," above emphasized by this writer. Although the statute purports to apply to agreements entered into *before* its enactment it obviously could not create a right to damages for conduct which had occurred and ceased prior to such enactment. In addition, the Act itself provides that it shall not affect the rights of any parties to any pending litigation. Section 12.

¹⁴² See Note, Maintenance of Right of Way over Restricted Property as Violation of Restrictive Covenant, 25 A.L.R.2d 904 (1952), which concludes that the general view is that a covenant restricting land to residential use is violated by the maintenance thereon of a right of way to other land being used for nonresidential purposes, even though the latter land is not restricted.

¹⁴³ *Flaks v. Wichman*, 260 P.2d 737 (Colo. 1953). The court distinguished cases involving the words "for private residences" or "the property shall be used for private residence purposes only," and quoted approvingly from cases of covenants forbidding "any building . . . for any other purpose than a private residence or dwelling house" or providing that "no building or structure other than a first-class private residence" should be erected.

¹⁴⁴ *Huffman v. Johnson*, 236 N.C. 225, 72 S.E.2d 236 (1952). See also *Jordan v. Orr*, 209 Ga. 161, 71 S.E.2d 206 (1952), 31 N.C.L. Rev. 118, where a covenant against erection of a duplex, specifically prohibiting use for various named nonresidential purposes but not in words prohibiting use as a duplex, was held not to prevent internal alterations of one-family house into a two-family residence.

and specifying that the land within such 200-foot radius might be used for business purposes, must be construed as obviously intended to prohibit erection of business buildings outside the 200-foot area.¹⁴⁵

Virginia¹⁴⁶ and North Carolina¹⁴⁷ have held, in line with the majority view,¹⁴⁸ that a restrictive covenant limiting the use of land solely to residential purposes is sufficiently a "property right," that an eminent domain taking of the restricted land for a nonresidential purpose requires payment of compensation to the owners of the land intended to benefit from the restriction.

In a case of first impression in Minnesota, it was held that a bona fide purchaser of registered land takes it free of a restrictive covenant which is not referred to in the grantor's certificate of title, notwithstanding that such restriction was noted on the back of the recorded plat referred to in the title certificate in describing the property.¹⁴⁹ Lesser developments include three substantial notes on the running of restrictive covenants in law¹⁵⁰ or in equity,¹⁵¹ and a Florida decision reversing a trial court finding that the evidence disclosed a change of circumstances rendering inequitable the enforcement of the covenant.¹⁵²

Tidelands.—Property (including ownership, "paramount rights," and royalties from offshore oil production) in the submerged seaward land is still a burning political question.¹⁵³ In the waning days of

¹⁴⁵ *McFarland v. Hanley*, 258 S.W.2d 3 (Ky. 1953). The plaintiffs had sought a declaratory judgment that the restrictions forbade the erection of a restaurant outside the 200-foot area. The trial court holding for the defendant was reversed, the appellate court pointing out that, although nonresidential construction beyond the 200-foot area was not specifically forbidden, the specification that businesses could be built within the area was added after the latter area had already been exempted from the minimum-cost restriction applicable to the rest of the subdivision, so would be merely surplusage unless a negative was implied.

¹⁴⁶ *Meagher v. Appalachian Elec. Power Co.*, 195 Va. 138, 77 S.E.2d 461 (1953) (right of way for electric transmission lines, involving the erection of 100-foot steel towers, taken by condemnation across land forbidden to be used for other than residential purposes).

¹⁴⁷ *City of Raleigh v. Edwards*, 235 N.C. 671, 71 S.E.2d 396 (1952), noted approvingly, 31 N.C.L. Rev. 125 (1952). This decision was quoted with approval in *Meagher v. Appalachian Elec. Power Co.*, *supra* note 146.

¹⁴⁸ 7 Thompson, *Real Property* § 3648 (Perm. ed. 1940); 2 *American Law of Property* § 9.40 (Casner ed. 1952). Cf. 4 Tiffany, *Real Property* § 1253 n.9 and related text; 2 Powell, *Real Property* § 191 nn.75, 76.

¹⁴⁹ *Kane v. State*, 55 N.W.2d 333 (Minn. 1952), noted approvingly, 51 Mich. L. Rev. 944 (1953) ("a wise though compromising result"), 37 Minn. L. Rev. 151 (1953).

¹⁵⁰ Note, 16 Mod. L. Rev. 428 (1953) (English cases); Recent Case, 22 Tenn. L. Rev. 970 (1953).

¹⁵¹ Note, *Equitable Restrictions in Land and Tulk v. Moxhay in Virginia*, 39 Va. L. Rev. 703 (1953).

¹⁵² *Sinclair Refining Co. v. Watson*, 65 So.2d 732 (Fla. 1953) (Hobson, J., concurring specially). Cf. *Pollack v. Bart*, 95 A.2d 864 (Md. 1953); Note, 13 Md. L. Rev. 219 (1953).

¹⁵³ Pertinent current articles include: Illig, *Offshore Lands and Paramount Rights*,

his administration, President Truman announced that he was about to issue an executive order turning over the offshore oil reserves to the Navy.¹⁵⁴ Moreover, he actually issued a tidelands executive order.¹⁵⁵ Promptly after taking office, Attorney General Brownell ruled informally that the order merely transferred authority over the oil from the Secretary of Interior to the Navy Secretary, but did not make the oil a part of the Navy Reserve.¹⁵⁶ On May 22, 1953, the Submerged Lands Act¹⁵⁷ became effective. By that Act, Congress declared that the United States released and relinquished to the respective coastal states (saving federal jurisdiction for purposes of navigation, commerce, national defense and international affairs) all its right, title and interest, if any, to "lands beneath navigable waters" of that state, the quoted words being defined as including both (1) lands within the state boundary covered by nontidal waters navigable under United States law at the time such state joined the Union, or acquired sovereignty thereover subsequently, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion and reliction; and (2) all lands covered by tidal water, between the line of mean high tide and a point three geographical miles seaward from the ordinary low water mark (except that Texas is allowed a maximum of three marine leagues—nine miles, and these are geographic, sea, or marine miles; not the shorter statute, or land, mile; hence three leagues exceeds ten and one-third statute miles—from such low water mark).¹⁵⁸

In addition to various other saving provisions, the Act revoked the applicable part of the above executive order, released all claims of the United States for money or damages to which under the *Tidelands* decisions it was entitled, and ordered federal officials to pay back whatever had been received. True to his campaign promises to Texas and Louisiana leaders, President Eisenhower signed the bill, and is now supporting it against attack. Rhode Island and Alabama have pending in the Supreme Court an application for permission to file suit in that Court against California, Texas, Louisiana and Florida, on the theory that the Submerged Lands Act is unconstitutional.¹⁵⁹

14 U. of Pitt. L. Rev. 10 (1952); Shearer, *Tidelands as a Legal and Political Battleground*, 22 J. Bar Ass'n Kan. 63 (1953); Tate, *Tidelands Legislation and Conduct of Foreign Affairs*, 28 Dep't State Bull. 486 (1953); Note, 21 Kan. City L. Rev. 52 (1952).

¹⁵⁴ N.Y. Times, Jan. 16, 1953, p. 1, col. 7.

¹⁵⁵ Exec. Order No. 10,426, 18 Fed. Reg. 405 (1953).

¹⁵⁶ N.Y. Times, Feb. 17, 1953, p. 1, col. 2 (news story); id. at p. 16, col. 4 (full text of ruling).

¹⁵⁷ 67 Stat. 29 (1953), 43 U.S.C.A. § 1301 (Supp. 1953). The legislative history of the Act appears in H.R. Rep. No. 215, 83d Cong., 1st Sess. (1953). See also Sen. Rep. No. 133, 83d Cong., 1st Sess. (1953).

¹⁵⁸ 67 Stat. 29 (1953), 43 U.S.C.A. §§ 1301-15 (Supp. 1953).

¹⁵⁹ Separate proceedings were instituted by Alabama and Rhode Island, each mov-

On the other hand, President Eisenhower declared that individual states have no special claims to submerged lands seaward of the boundaries recognized in the above Act. He accordingly approved a bill concerning oil and gas development of mineral resources lying seaward of such boundaries.¹⁰⁰ Ultimately approved on August 7, 1953, it is known as the Outer Continental Shelf Lands Act.¹⁰¹

*Weather Control.*¹⁰²—In 1953 Congress passed and the President signed a bill providing for the appointment of a twelve-man temporary Advisory Committee on Weather Control, empowered to take testimony, hold hearings, and require the keeping and production of records by weather-control experimenters.¹⁰³ President Eisenhower set up the board on December 9, 1953.¹⁰⁴ The Committee is to report by June 30, 1956, on the advisability of government regulation, by licensing or otherwise, of weather modification activities.

Several states have already attempted to encourage, discourage, or regulate weather experimenters.¹⁰⁵ Various other opinions,¹⁰⁶ proposals¹⁰⁷ and possibilities¹⁰⁸ were discussed.

ing for leave to file a complaint. Motions by the defendants for time to file objections to the plaintiff's motion were granted. *Alabama v. Texas*, 346 U.S. 862 (1953); both cases were later assigned for argument on the motion for leave to file complaint. *Rhode Island v. Louisiana*, 346 U.S. 933 (1954); *Alabama v. Texas*, 346 U.S. 933 (1954). For an account of the oral arguments before the Court see *N.Y. Times*, Feb. 4, 1954, p. 1, col. 5. Warren, C.J., did not participate in the above proceedings.

¹⁰⁰ *N.Y. Times*, May 15, 1953, p. 11, col. 1. See H.R. Rep. No. 215, 83d Cong., 1st Sess. (1953), that the House had originally passed the Submerged Lands Bill with a Title III covering the outer continental shelf. This title was stricken out by the Senate. Substantially the same provisions were later incorporated in H.R. 5134, which was passed by the House on May 13, 1953. 67 Stat. 462 (1953), 43 U.S.C.A. §§ 1331 et seq. (Supp. 1953).

¹⁰¹ 67 Stat. 462 (1953), 43 U.S.C.A. §§ 1331 et seq. (Supp. 1953). See Christopher, *The Outer Continental Shelf Lands Act: Key to a New Frontier*, 6 *Stan. L. Rev.* 23 (1953).

¹⁰² Lest new readers imagine that this topic was artificially precipitated into the present article, it bears repeating that its mention herein for the last six years was prompted by its bearing on the questions of how high up a landowner owns, and whether clouds are vapores ferae naturae.

¹⁰³ 67 Stat. 559 (1953), 15 U.S.C.A. § 311 (Supp. 1953).

¹⁰⁴ *N.Y. Times*, Dec. 10, 1953, p. 1, col. 2.

¹⁰⁵ See, e.g., N.M. Stat. Ann. §§ 54-1315-16 (Supp. 1951) (declaring that attempts to increase rainfall are in the public interest, and authorizing such groups to form nonprofit corporations); *N.Y. Times*, July 29, 1953, p. 25, col. 7 (Colorado Weather Control Commission backs rainmaking study); 1953 Survey of New York Law, 28 *N.Y.U.L. Rev.* 1465 (1953) (status of rainmaking suits against New York City; Governor Dewey's veto of 1953 New York legislation authorizing licensing and control of rainmaking).

¹⁰⁶ *N.Y. Times*, Feb. 7, 1953, p. 31, col. 2 (Dr. Lieberman asserts that cloud seeding did not significantly increase rainfall in Santa Clara, Calif., valley); *id.*, Sept. 24, 1953, p. 50, col. 3 (Australian asserts he can increase rainfall 50 per cent by artificial means).

¹⁰⁷ *N.Y. Times*, March 8, 1953, p. 13, col. 2 (Brazil may seek Point Four funds for artificial rainmaking tests).

¹⁰⁸ *N.Y. Times*, March 7, 1953, p. 27, col. 1 (Besler patents generator for pro-

*Miscellaneous.*¹⁶⁹—There were also footnoteworthy developments concerning abandonment (of chattels),¹⁷⁰ adjoining landowners (lateral and subjacent support),¹⁷¹ airspace,¹⁷² bona fide purchasers,¹⁷³ boundaries,¹⁷⁴ cemeteries,¹⁷⁵ church property,¹⁷⁶ dead bodies,¹⁷⁷ dedi-

ducing artificial fog); *id.*, May 7, 1953, p. 46, col. 3 (Dr. Howell states that he could probably produce a *rainless* day for \$10,000); *id.*, July 6, 1953, p. 19, col. 6 (Weather Bureau expert states that study of atmosphere from future space platforms will aid in regulating weather). As the year ended, artificial snow-making was urged for ski resort areas in Switzerland and New England. See also *id.*, May 24, 1953, § 4, p. 11, col. 6; *id.*, June 28, 1953, § 4, p. 9, col. 6.

¹⁶⁹ Simes, *Important Differences Between American and English Property Law*, 27 *Temp. L.Q.* 45 (1953).

¹⁷⁰ See 37 *Minn. L. Rev.* 483 (1953); *Sharkiewicz v. Lepone*, 139 *Conn.* 706, 96 A.2d 796 (1953) (owner of 1936 car worth twenty dollars failed to remove it from a neighbor's lot upon request; held, one judge dissenting, insufficient to constitute abandonment).

¹⁷¹ *Levi v. Schwartz*, 95 A.2d 322 (Md. 1953); *Williams v. Thompson*, 256 S.W.2d 399 (Tex. 1953); *Johnson, Legal Hazards of Excavation in Quebec*, 31 *Can. B. Rev.* 626 (1953); *Note*, 6 *Stan. L. Rev.* 104 (1953).

¹⁷² *Note, The Creation of Estates in Airspace*, 25 *Rocky Mt. L. Rev.* 354 (1953).

¹⁷³ See *Bailments*, p. 782 *supra*. Although applying basic principles, *National Cash Register Co. v. Malitz*, 93 *Ohio App.* 241, 113 N.E.2d 493 (1953), is interesting because it presents an unsuccessful attempt of a purchaser from a thief to recover damages from the theft victim for failing promptly to report the theft. A stolen adding machine was pledged to a pawnbroker, who eventually sold it at a pawnbroker's sale, buying it himself at the pledge figure and shortly thereafter reselling it for treble that amount. Sued by the true owner for conversion, the pawnbroker cross-petitioned for damages for the owner's negligence in not reporting the theft for twenty-one months. By agreement, local pawnbrokers were regularly furnished by the police with lists of lost and stolen articles, and checked such lists before making loans. The plaintiff allegedly knew of such practice, but the cross-petition was nonetheless denied. In affirming, the intermediate court pointed out that, being under no duty to the pawnbroker, the theft victim could not be termed actionably negligent.

¹⁷⁴ In addition to the many current cases on the fixing of disputed boundaries by acquiescence, see 37 *Minn. L. Rev.* 382 (1953).

¹⁷⁵ *Troy Cemetery Ass'n v. Davis*, 223 S.C. 305, 75 S.E.2d 458 (1953) (purchase of walkway between adjacent lots); *State v. Forest Lawn Lot Owners Ass'n*, 254 S.W.2d 87 (Tex. 1953) (foreclosure of vendor's lien on land which vendee-cemetery had divided into burial lots and sold; effect on interments antedating foreclosure).

¹⁷⁶ For a postscript to the Supreme Court decision, *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94 (1952), noted in 1952 *Annual Surv. Am. L.* 517 n.148, 28 *N.Y.U.L. Rev.* 580 n.148 (1953), see *Saint Nicholas Cathedral v. Kedroff*, 306 N.Y. 38, 114 N.E.2d 197 (1953), 1953 *Survey of New York Law*, 28 *N.Y.U.L. Rev.* 1466 (1953). *Boyer, Property Rights of Religious Institutions in Wisconsin*, 36 *Marq. L. Rev.* 329 (1953).

¹⁷⁷ *McAndrew v. Quirk*, 329 *Mass.* 423, 108 N.E.2d 667 (1952) (sister denied right to bury husband in her father's family plot); *Leschey v. Leschey*, 374 *Pa.* 350, 97 A.2d 784 (1953) (widow permitted to remove husband's body from fully occupied plot for reinterment in plot having space for future burial of widow, deceased having expressed wish that they be buried together); *Theodore v. Theodore*, 57 *N.M.* 434, 259 P.2d 795 (1953) (wife denied permission to disinter husband); *King v. Smith*, 236 *N.C.* 170, 72 S.E.2d 425 (1952) (great-granddaughter who would have participated under statute of distributions, but was not the nearest of kin, allowed to maintain tort action for desecration of ancestor's grave).

cation,¹⁷⁸ escheat,¹⁷⁹ fixtures,¹⁸⁰ licenses,¹⁸¹ recording¹⁸² and title examination,¹⁸³ Torrens system¹⁸⁴ and waste.¹⁸⁵ There were, however, no developments concerning finders and lost goods.¹⁸⁶

II

LANDLORD AND TENANT

Statute of Frauds.—In *Hoover v. Wukasch*¹⁸⁷ the Texas Supreme Court, with three judges dissenting, held that a written five-year lease

¹⁷⁸ Of ten cases examined, the most important are: *Sioux City v. Tott*, 60 N.W.2d 510 (Iowa 1953) (common-law dedication; evidence reviewed, and lower court finding of dedication reversed); *Odell v. Pile*, 260 S.W.2d 521 (Mo. 1953) (grant to city of easement to permit widening of street contiguous to square, held not to be a diversion of land dedicated as courthouse square); *Owens v. Hockett*, 251 S.W.2d 957 (Tex. 1952) (evidence held sufficient to establish common-law dedication). Notes, What Constitutes Intent to Dedicate in South Carolina, 6 S.C.L.Q. 96 (1953); 31 N.C.L. Rev. 202 (1953).

¹⁷⁹ Developments arose principally under the New Jersey Escheat Act. *State v. Otis Elevator Co.*, 12 N.J. 1, 95 A.2d 715 (1953) (Jacobs and Heber, JJ., dissenting in part); *State v. United States Steel Corp.*, 12 N.J. 38, 95 A.2d 734 (1953) (Brennan and Jacobs, JJ., and Vanderbilt, C.J., dissenting in part).

¹⁸⁰ Of seven cases examined, two from courts of last resort merit citation: *Butler v. Butler's Diner, Inc.*, 98 A.2d 875 (R.I. 1953) (upholding finding that restaurant building was "trade fixture," chattel mortgagee thereof prevailing against realty landlord); *Parrish v. Southwest Washington Production Credit Ass'n*, 41 Wash. 2d 586, 250 P.2d 973 (1952). Of more interest for Californians is *Horowitz, The Law of Fixtures in California—A Critical Analysis*, 26 So. Calif. L. Rev. 21 (1952).

¹⁸¹ See 41 Geo. L.J. 278 (1953).

¹⁸² Note, 6 U. of Fla. L. Rev. 114 (1953). In *Messersmith v. Smith*, 60 N.W.2d 276 (N.D. 1953), it was held that if a landowner conveyed to A (who failed to record) and thereafter executed a deed of the same estate to B, who promptly recorded, B and his grantees would not prevail against A where the deed to B, although containing a certificate of acknowledgment was proved never to have been acknowledged. *Barbee Mill Co. v. State*, 261 P.2d 418 (Wash. 1953) (state, being under no duty to record its title to land acquired pursuant to Enabling Act for the support of agricultural colleges, prevailed against subsequent bona fide patentee from the United States).

¹⁸³ *Eberhardt, Real Property*, 5 Mercer L. Rev. 140 (1953) (citing Ga. Laws 1953, p. 63, that a prima facie case arises in actions respecting land upon the showing of good record title for forty years); *Game, Examination of Abstracts*, 6 U. of Fla. L. Rev. 77 (1953); *Hayes & Teske, Iowa Title Standards I*, 2 Drake L. Rev. 76 (1953); *Hayes & Teske, Iowa Title Standards II*, 3 Drake L. Rev. 36 (1953); *Jennings, Marketability of Titles in Florida*, 7 Miami L.Q. 318 (1953); *Leahy, The North Dakota Marketable Record Title Act*, 29 N.D.L. Rev. 265 (1953); *Marshall, Development of Title Examination Standards in Iowa*, 38 Iowa L. Rev. 534 (1953); *Wright, Title Examination as Affected by the Federal Gift and Estate Tax Liens*, 51 Mich. L. Rev. 325 (1953). See also Note, *Possession of Land by the Grantor as Notice of His Rights in Pennsylvania*, 57 Dick. L. Rev. 228 (1953).

¹⁸⁴ See 51 Mich. L. Rev. 944 (1953), 37 Minn. L. Rev. 151 (1953).

¹⁸⁵ *Wilson v. Kruse*, 258 P.2d 112 (Ore. 1953) (suit for statutory treble damages, against termor whose subtenant committed waste); Note, *Classifications and Construction of Statutes Awarding Multiple Damages for Waste*, [1953] Wis. L. Rev. 725.

¹⁸⁶ There were no articles or important notes in this country (cf. Note, 116 Just. P. 418 [1952]) and only one reported case, *Dolitsky v. Dollar Savings Bank*, 203 Misc. 262, 118 N.Y.S.2d 65 (N.Y. Munic. Ct. 1952).

¹⁸⁷ 254 S.W.2d 507 (Tex. 1953).

which was invalid as a lease because the agent who executed it for the lessor had no written authority, as required by statute, could be enforced as a contract to lease. While the majority opinion based the decision in part upon a curative provision in the Texas statutes, there is authority for reaching this result without such aid.¹⁸⁸ The difficulty, of course, arises because of a difference in the formal requirements for leases and for contracts to make a lease. At least as between the parties, there seems to be no reason why the requirements should not be the same, and under modern code pleading that is the result of holding that the defectively executed lease can be enforced as a contract.

Tenancy at Will.—While there is some conflict in the decisions¹⁸⁹ statutes which prescribe that notice of a particular period must be given in order to terminate a tenancy at will would seem to convert such a tenancy into a substantial estate, in effect a periodic tenancy. This is the result of a New Jersey case¹⁹⁰ which held that, under a statute requiring three months' notice to terminate a tenancy at will, such a tenancy was not terminated by death of the landlord.

The California statutes on this and related questions were the subject of an extended comment.¹⁹¹

Implied Covenants: Use and Enjoyment.—In view of the emphasis upon "Balance Agriculture with Industry" programs in many states and localities, the case of *Greenfeld v. Supervisors' District Number 3 of Perry County*¹⁹² is of particular interest. Apparently the leased building had been constructed with funds raised by a county bond issue, pursuant to a Mississippi law adopted to encourage manufacturing. The lease provided that the lessee was to equip the building for the operation of a shirt or garment factory which the court said "implied that it would be used for that purpose." The lessee also agreed that its payroll for the factory during the first year of operation would be not less than 50 per cent of the cost of the building to the lessor and that its minimum payroll each year thereafter would be not less than 100 per cent of said cost until the lessee's total payroll payments equaled fifteen times the cost of the building. This guarantee, according to the court, was subject to the limitation that the entire liability of the lessee for failure to meet the minimum guaranteed payroll was limited to 10 per cent of the deficiency. The

¹⁸⁸ See 1 American Law of Property § 3.17 n.11 (Casner ed. 1952).

¹⁸⁹ 1 id. § 3.31.

¹⁹⁰ *Gretkowski v. Wojciechowski*, 26 N.J. Super. 245, 97 A.2d 701 (App. Div. 1953).

¹⁹¹ *Glickman*, Some Problems Involving the California Statutes on Landlord and Tenant, 4 Hastings L.J. 161 (1953).

¹⁹² 205 F.2d 323 (5th Cir. 1953).

lessor sought to cancel the lease because of the practical cessation of manufacturing operations on the premises after the second year of the lease. The Court of Appeals for the Fifth Circuit, with one judge dissenting, reversed a district court judgment canceling the lease but stated that the lessor was entitled to an injunction restraining the lessee from using the premises as a warehouse in conjunction with its factory in another town. Thus the court implied a restriction on use but refused to imply a duty to use. The court gave no reason for its conclusion on the latter point, but the lessee contended that its liability was limited by the lease to damages. The district court and the dissenting judge took the position that this provision was merely one for liquidated damages. Pointing out that the county had no authority to enter into the lease contract except pursuant to the "Balance Agriculture with Industry" law which had a declared purpose of promoting employment, the dissenting judge would imply a covenant to operate the premises as a shirt or garment factory. Under the circumstances there is much to be said for this view, although such a covenant generally is implied only where the rent depends upon the tenant's use.¹⁰³

Where the rent is based upon a percentage of sales, some courts impose a duty of use and reasonable effort even though a minimum rental is provided,¹⁰⁴ but in *Percoff v. Solomon*¹⁰⁵ the Alabama court joined the list of those courts refusing to imply such a covenant. The lessor in the *Percoff* case was seeking to enjoin the lessee from operating a competing business in the immediate vicinity, but the court said that any such restrictive covenants should be expressed in the lease.

The cases during the year continued to deny a general implied covenant of fitness¹⁰⁶ but to impose on the lessor a duty to disclose known dangerous defects which are concealed.¹⁰⁷

Breach of an express covenant to supply heat was held to give rise to a constructive eviction in a Utah case.¹⁰⁸

McVeigh v. McAlpine,¹⁰⁹ a Michigan case, presented an unusual situation. The tenant, who had been partially evicted, held over after the end of the term and sought to use the eviction as a defense to an

¹⁰³ 1 American Law of Property § 3.41.

¹⁰⁴ 1 id. § 3.41 n.10; *Mutual Life Ins. Co. v. The Tailored Woman, Inc.*, 123 N.Y.S.2d 349 (Sup. Ct. 1953).

¹⁰⁵ 67 So.2d 31 (Ala. 1953).

¹⁰⁶ *Anderson Drive-In Theatre, Inc. v. Kirkpatrick*, 110 N.E.2d 506 (Ind. 1953).

¹⁰⁷ *Earle v. Kuklo*, 26 N.J. Super. 471, 98 A.2d 107 (App. Div. 1953) (premises infected with tuberculosis germs).

¹⁰⁸ *Thirteenth & Washington Streets Corp. v. Neslen*, 254 P.2d 847 (Utah 1953).

¹⁰⁹ 335 Mich. 413, 56 N.W.2d 239 (1953).

action for possession for nonpayment of rent. It was held that while actual partial eviction suspends the liability for rent as long as the eviction continues, it is no defense to an action for possession after the end of the term.

Assignments and Subleases.—An unusual factual situation was presented in *J. F. Auderer Laboratories v. Deas*.²⁰⁰ The lease was for three years at a monthly rental of \$325 and gave the lessee an option to purchase at the expiration of the term (September 30, 1950) by notifying the lessor prior to April 1, 1950. The lessee "assigned" the lease to M at a rental of \$350 per month, specifically including the right to purchase prior to March 1, 1950, instead of April 1, 1950. M then "assigned" to the plaintiff at a rental of \$375 per month, including the right to purchase prior to February 15, 1950. Subsequently M transferred his reserved rights to the plaintiff for a consideration of \$1,000. On February 20, 1950, plaintiff notified the lessor that he was exercising the option to purchase, and so advised M and the original lessee. The lessors having failed to respond to this and other notices even after the end of the original term, the plaintiff sued for specific performance. Defendants contended that plaintiff was only a sublessee without "contractual tie" with the defendants and therefore had no right to exercise the option. The court admitted that under its decisions the reservation of an overriding rent and the retained interest in the option made the transfer of the leasehold to M and to the plaintiff²⁰¹ subleases. However, the court said that the option to purchase was assignable apart from the lease but from its nature could not be subleased. Accordingly, the plaintiff was an assignee as to the option and entitled to specific performance. This case would seem to justify the adoption of a rule that has been suggested: that "whether a given transfer is a sublease or an assignment depends upon the intention of the parties to the transfer, provided the lessor is not prejudiced thereby."²⁰² As to the right to exercise the option there would be no doubt that an assignment, in the sense that the transferee was to have the right conferred in the lease, was intended and that the lessor was not prejudiced. There is a conflict in the decisions on the question of the right to assign an option to purchase apart from the lease, and there certainly would be reason to deny the right to assign to a stranger.²⁰³

²⁰⁰ 67 So.2d 179 (La. 1953).

²⁰¹ The later transfer by M to the plaintiff passed all M's rights, but the original lessee still had reserved rights.

²⁰² 1 American Law of Property 299.

²⁰³ See 1 id. at 361.

But the plaintiff's interest in the lease in the *Auderer* case justifies a transfer to him of the option.²⁰⁴

Estoppel to Deny Landlord's Title.—A federal court of appeals found it difficult to decide whether to apply this doctrine to the particular facts involved in the case of *Kimble v. Willey*.²⁰⁵ The plaintiff, the record title owner of relatively inaccessible grazing land, sued to quiet title, and the defendant claimed by adverse possession commencing with possession under a void tax deed. Both parties relied upon the possession of the same tenant. It appeared that the tenant had first taken a one-year lease from the defendant, this lease being promptly recorded, and then, before this lease expired and without yielding possession, had taken a lease from plaintiff's predecessor in title. The latter lease was not recorded. The tenant had continued in possession without paying rent to either party. The court first held that the doctrine of estoppel did not apply to permit the defendant to rely on the tenant's possession. Later this opinion was withdrawn and the trial court's decision for the defendant affirmed, the court finding that Arkansas law would apply the doctrine of estoppel in this situation. This finding was based on an unreported Arkansas trial court case. The circuit judge who wrote the first opinion, which was withdrawn, wrote a dissenting opinion. He denied that the Arkansas case relied on was controlling and took the position that the estoppel should not apply where the tenant enters into a lease with the legal owner who has no knowledge of a prior tenancy relationship with another who may be claiming adversely.

Rent and Security.—The ninety-nine-year lease in *Schneider v. Bank of Lansing*²⁰⁶ contained a provision that at the end of every ten years the rental was to be determined by the parties and, on their failure to agree, by three "referees." Attempted arbitration at the end of twenty years failed, and the lessors brought an action to have the court establish a fair rental. It was held that the trial court properly fixed the rent, using a yield of 5 per cent upon the value of the property, including a proportionate share of a building erected by the tenant and resting in part upon the demised premises.²⁰⁷ The lease here gave no indication of factors to be taken into consideration in fixing the rental and did not fix a rate of return. The court held

²⁰⁴ For a local discussion of covenants against assignment see *Hoy, Dumpor's Case* in Missouri, 18 Mo. L. Rev. 34 (1953).

²⁰⁵ 204 F.2d 238 (8th Cir. 1953), vacating 198 F.2d 812 (8th Cir. 1952), and affirming 98 F. Supp. 730 (E.D. Ark. 1951).

²⁰⁶ 60 N.W.2d 187 (Mich. 1953).

²⁰⁷ The building on the premises at the time the lease was executed had been torn down. The lease contemplated such action.

that in arriving at a fair rent it was proper to consider earnings, volume of business and comparative rentals with other buildings. This decision should be contrasted with *Beal v. Dill*.²⁰⁸ There an option to renew the lease for three years, the rent to "be subject to reasonable adjustment up or down, depending upon general business conditions then existing," was held too indefinite to enforce.²⁰⁹

The courts continue to divide on the question of whether a periodic tenant who stays on after receiving a notice of an increase in rent is bound to pay the increased rental. A New Jersey decision holds that the landlord must also serve a notice to quit,²¹⁰ while a federal district court in Kentucky reached a contrary conclusion.²¹¹

Several decisions were concerned with the problem of advance rent and security.²¹² *Householder v. Black*²¹³ held that a lessor, on re-entry for condition broken, could retain the rent for the third year which had been paid in advance. In *Abrams v. St. Louis County Library District Board*²¹⁴ the Missouri Supreme Court followed the general rule in holding that a provision permitting the lessor to retain a \$20,000 deposit as liquidated damages if the lessee violated "any of the terms and conditions" of the lease contemplated a penalty rather than damages. The trustee for the benefit of the lessee's creditors recovered the excess over the lessor's actual damages. *Ricker v. Rombough*²¹⁵ held that a clause accelerating the entire rental upon failure to pay any installment was void.

Taxes and Assessments.—In *Black v. General Wiper Supply Co.*²¹⁶ the New York Court of Appeals considered the novel question of whether the tenant was liable for sewer rents imposed by the City of New York in 1950, after the lease was executed. The lease provided that the lessee would pay all water rents and water taxes. The law imposing sewer rents placed them on the "owner," the charge being based upon the amount of water used. In view of the fact that the lessor drafted the lease and that it was common knowledge when

²⁰⁸ 173 Kan. 879, 252 P.2d 931 (1953). See 1 American Law of Property § 3.68 n.7.

²⁰⁹ For a recent article discussing various types of rent provisions, see Denz, Lease Provisions Designed to Meet Changing Economic Conditions, [1952] U. of Ill. L. Forum 344.

²¹⁰ *Skyline Gardens, Inc. v. McGarry*, 22 N.J. Super. 193, 91 A.2d 621 (App. Div. 1952), 25 Rocky Mt. L. Rev. 383 (1953).

²¹¹ See *Hundley v. Milner Hotel Management Co.*, 114 F. Supp. 206 (W.D. Ky. 1953).

²¹² See also *Rhynhart, Distress*, 13 Md. L. Rev. 185 (1953).

²¹³ 62 So.2d 50 (Fla. 1953) (rehearing denied).

²¹⁴ 258 S.W.2d 672 (Mo. 1953). Cf. *Randall v. General Motors Corp.*, 350 Ill. App. 384, 112 N.E.2d 915 (1953).

²¹⁵ 261 P.2d 328 (Cal. App. 1953).

²¹⁶ 305 N.Y. 386, 113 N.E.2d 528 (1953).

the lease was executed that cities had the power to levy such charges, the court held that the lessee was not liable for them. It is clear that the term "taxes" does not include such charges.²¹⁷

Repairs and Improvements.—The case of *Bowles v. Mahoney*²¹⁸ is important for the vigorous dissenting opinion of Judge Bazelon. Referring to the rule that the landlord is not responsible for an injury resulting from a defect which developed during the term, he said: "I think that the rule is an anachromism [sic] which has lived on through stare decisis alone rather than through pragmatic adjustment to 'the felt necessities of [our] time.' I would therefore discard it and cast the presumptive burden of liability upon the landlord. This, I think, is the command of the realities and mores of our day."²¹⁹

While exculpatory clauses are generally upheld, it was held in *Boyd v. Smith*²²⁰ that, as a matter of public policy, such a clause would not relieve a lessor for injuries due to fire where he had failed to provide a fire escape as required by law.

In an Ohio case,²²¹ a tenant had made valuable improvements which would become the property of the landlord at the end of the term without any compensation to the tenant. The court indicated that the tenant could recover no part of the value of such improvements if his lease was forfeited because the premises were used for purposes of prostitution. Analogy was drawn to the case of advance rental which cannot be recovered on premature termination.²²²

Renewals.—The courts are loathe to give relief to a lessee who fails to give notice of his intention to renew within the time provided in the lease. In *Jones v. Gianferante*,²²³ however, the New York Court of Appeals approved the giving of relief based on a finding that the failure resulted from an honest mistake and that the landlord was not prejudiced.

Termination.—When a tenant abandons the premises and refuses to pay rent the lessor has several possible courses of action open to him. The importance of distinguishing these courses of action is emphasized by two cases. In *Jordon v. Nickell*²²⁴ the Kentucky court

²¹⁷ See also *Valenti v. Tepper Fields Corp.*, 282 App. Div. 212, 122 N.Y.S.2d 599 (1st Dep't 1953).

²¹⁸ 202 F.2d 320 (D.C. Cir. 1952), cert. denied, 344 U.S. 935 (1953).

²¹⁹ Id. at 325. Cf. *Hefferin v. Scott Realty Co.*, 254 P.2d 194 (Wyo. 1953), where the court held the lessor, who had not covenanted to repair, was not liable for ineffective and improper repairs which allegedly injured the tenants' health.

²²⁰ 372 Pa. 306, 94 A.2d 44 (1953).

²²¹ State ex rel. Hover v. Braxton W. Campbell Co., 114 N.E.2d 613 (Ohio C.P. 1953).

²²² See Rhynhart, *supra* note 212.

²²³ 305 N.Y. 135, 111 N.E.2d 419 (1953).

²²⁴ 253 S.W.2d 237 (Ky. 1952).

states, as do most other courts, that the lessor may let the premises lie idle and sue for rent as it accrues²²⁵ or sue for entire damages, treating the lease as a contract and the lessee's action as an anticipatory breach.²²⁶ If the lessor sues for rent, he is treating the lease as existing; therefore he cannot recover for rent which is not yet due by the terms of the lease. In both the *Jordon* case and in the Mississippi case of *Stableford v. Schulingkamp*²²⁷ it was held that the plaintiff's action was framed as one for rent and recovery was accordingly limited to rent accrued to the date of the suit.

The decision of the Court of Appeals for the Eighth Circuit in *Ten-Six Olive, Inc. v. Curby*²²⁸ is likely to have an important bearing upon the dealings of lessors with bankrupt tenants. The lessor in that case had consented to an assignment of the lease by an agreement which stated that the original lessees would remain liable as "sureties." Subsequently, a petition for reorganization of the assignee under Chapter X of the Bankruptcy Act²²⁹ was filed. The reorganization trustee paid the stipulated rent for more than a year. Then the assignee was adjudged a bankrupt and within less than two months the trustee in bankruptcy vacated the premises. The lessor sought damages under Section 63(a)(9) of the Bankruptcy Act,²³⁰ which now allows claims for anticipatory breach of contract and specifically includes unexpired leases. However, there was evidence that before the bankrupt vacated the premises the lessor had placed "For Rent" signs on them, demanded and received a set of keys, in various ways advertised the premises for rent, and released the original lessees from their surety agreement. Apparently the latter action was taken because of a belief that the premises might be let, with improvements made by the tenants, at an increased rental and that possible bankruptcy of the original lessees, who were demanding possession, might interfere with such plans. Upon this evidence the court upheld a finding of the referee that the lessor had accepted a surrender without rejection by the trustee and held that under Section 63(a)(9) of the Bankruptcy Act the damages "must flow from and be predicated upon an 'injury resulting from the rejection of an unexpired lease of real estate.'" The lessor also contended that under a prior decision of the court²³¹ the failure of the *reorganization* trustee to affirm or disaffirm the lease within sixty days was a rejection under Sections 63

²²⁵ 1 American Law of Property § 3.99 n.16.

²²⁶ 1 id. § 3.11 n.11, § 3.99 n.21.

²²⁷ 67 So.2d 306 (Miss. 1953).

²²⁸ 208 F.2d 117 (8th Cir. 1953).

²²⁹ 52 Stat. 840 (1938), 11 U.S.C. §§ 501 et seq. (1946).

²³⁰ 30 Stat. 562 (1898), 11 U.S.C. § 103(a)(9) (1946).

²³¹ *Wiemeyer v. Koch*, 152 F.2d 230 (8th Cir. 1945).

and 70 of the Bankruptcy Act,²³² but the court held that by accepting rent under the lease for a year the lessor waived any right to claim the benefit of such rejection. If the lessor of a bankrupt tenant has any idea of filing a claim for damages arising from premature termination of the lease, he should avoid acts that can be interpreted as acceptance of surrender until the lease has been rejected.

The effect on the landlord and tenant relation of destruction of a building on the premises was discussed in detail in a note.²³³

Rent Control.—Federal rent control, which was given a new lease on life by the Korean affair, was almost ended in 1953, and there was every reason to believe that it would be completely extinguished in 1954. Congress refused to extend the Housing and Rent Act of 1947,²³⁴ except as to critical defense housing areas, and as to these it was provided that controls would terminate April 30, 1954.²³⁵

On the state level, New York continued its rent control legislation. Business and commercial rent control laws were extended to July 1, 1954,²³⁶ while residential controls were extended until June 30, 1955.²³⁷ Changes in these laws were the subject of two articles.²³⁸

III

VENDOR AND PURCHASER

The Statute of Frauds.—The year's most significant decision on specific performance of oral contracts to convey land interests dealt with an agreement to convey a perpetual easement for maintaining a common garden project on the rear portion of defendant's parcel. The easement was to be appurtenant to adjacent land and buildings which the plaintiff purchased in reliance on the oral promise.²³⁹ Where the

²³² 52 Stat. 873 (1938), 11 U.S.C. § 103(c) (1946); 52 Stat. 879 (1938), 11 U.S.C. § 110(b) (1946). For further discussion of this point see Gleick, *Rent Claims and Security Deposits in Bankruptcy*, 18 Mo. L. Rev. 1, 9-10 (1953).

²³³ 32 Ore. L. Rev. 336 (1953). See also Garrett, *Lease Provisions against Special Contingencies*, [1952] Ill. L. Forum 395 (a symposium issue devoted to Landlord and Tenant).

²³⁴ 61 Stat. 196 (1947), 50 U.S.C. App. §§ 1891 et seq. (Supp. 1952).

²³⁵ 67 Stat. 24 (1953), 50 U.S.C.A. App. § 1894(B) (Supp. 1953).

²³⁶ N.Y. Laws 1953, cc. 452, 451.

²³⁷ N.Y. Laws 1953, c. 321.

²³⁸ Morris & Sternlie, *The 1953 Amendments to the Residential Rent Control Law and Regulations*, 129 N.Y.L.J. 1866, col. 1 (June 3, 1953); Shaw, *The Commercial Rent Laws as Recently Amended and Re-enacted*, 129 N.Y.L.J. 1330, col. 1 (April 22, 1953). See also Administrator's Opinions Clarifying Policy under the New Rent and Eviction Regulations, 129 N.Y.L.J. 1514, col. 1 (May 6, 1953). Also on rent control see Weiss, *Inequity and Rent Regulation: A Study in the Control of Administrative Procedure*, 53 Col. L. Rev. 28 (1953), and Weiss, *Administrative Reconsideration: Some Recent Developments in New York*, 28 N.Y.U.L. Rev. 1262 (1953).

²³⁹ *Gracie Square Realty Corp. v. Choice Realty Corp.*, 305 N.Y. 271, 113 N.E.2d 416 (1953), 5 Syracuse L. Rev. 106.

oral agreement is to convey a possessory interest, possession taken by the purchaser is a required element of part performance.²⁴⁰ The analogous requirement in the case of an oral promise to convey an easement is a user of the alleged servient land by the promisee.²⁴¹ The decision that purchasing the adjacent property and incurring expense in preparing plans for developing the garden did not constitute part performance is well within those precedents which require acts unequivocally referable to the existence of the oral contract.²⁴² The decision serves to eliminate the possibility²⁴³ that the developing pattern in the New York decisions may include specific performance of an oral contract solely to redress equitable fraud²⁴⁴ and without the requirement of acts of performance referable to the alleged agreement.

Conditions: The Vendor's Title.—It is sometimes difficult to distinguish between cases within the rule that a purchaser may claim hardship as a defense to a specific performance action and cases in which a defect in the vendor's title or fraud or mistake justifies rescission by the purchaser. This is illustrated in a New York decision which denies both the vendor's complaint for specific performance and the purchaser's counterclaim for return of the down payment.²⁴⁵

A Kentucky decision is within the precedents in finding the vendor's title unmarketable where a deed in the chain of title imposes a *forfeiture condition* for sale of intoxicating beverages although the parties negotiated with knowledge that the property was affected by a *covenant* against sale of liquor.²⁴⁶

A statutory provision that a judgment quieting title may be attacked for three years by any defendant in the proceeding who was served only by publication does not render title unmarketable for the three-year period, because of the statutory exception in favor of bona fide purchasers.²⁴⁷ Another decision from Kentucky²⁴⁸ where the title rested upon probate but was subject by statute to possible attack for two years holds title marketable during the two years because the statute provides for conveyance of valid title by the devisee to a bona fide purchaser. These decisions appear to rest the marketability of

²⁴⁰ Restatement, Contracts § 197 (1932).

²⁴¹ Hay v. Knauth, 169 N.Y. 298, 62 N.E. 395 (1901).

²⁴² See 1950 Annual Surv. Am. L. 569-70.

²⁴³ Roberts v. Fulmer, 301 N.Y. 277, 93 N.E.2d 846 (1950).

²⁴⁴ Jones v. Linder, 247 S.W.2d 817 (Mo. 1952), and comment, 1952 Annual Surv. Am. L. 530, 28 N.Y.U.L. Rev. 593 (1953).

²⁴⁵ Micbar Realty Corp. v. Truval Realty Corp., 202 Misc. 969, 120 N.Y.S.2d 150 (Sup. Ct. 1952). And see Kleinberg v. Ratett, 252 N.Y. 236, 169 N.E. 289 (1929).

²⁴⁶ Hoskins v. Walker, 255 S.W.2d 480 (Ky. 1953).

²⁴⁷ Gordon v. Holman, 207 Okla. 496, 250 P.2d 875 (1952).

²⁴⁸ Chastain v. McKinney, 203 F.2d 712 (6th Cir. 1953). See Note, 27 St. John's L. Rev. 336 (1953).

the vendor's title upon the good faith of the purchaser who is defendant in the specific performance action.

An Arizona decision²⁴⁹ makes two points about marketable title litigation. The first is the suggestion that the vendor might have included the adverse claimants as parties defendant in the specific performance action against the purchaser. The second is that even at the stage of final appeal there is equity discretion to allow the vendor a further reasonable time to perfect his title.

While the unmarketable nature of the vendor's title may preclude the vendor from claiming specific performance, it will not stand in the way of the vendor's action to cancel the contract and to recover rental value from a purchaser who remained ten years in possession.²⁵⁰

Rights of the Parties Prior to Closing the Contract: Equitable Conversion.—A California court recognized the right of the purchaser after contract and prior to closing that the vendor shall not commit acts in the nature of affirmative waste.²⁵¹

A decision applying New York law to an option contract made and to be exercised in New York for the purchase of Ontario land, was justified by the concession of counsel that New York law applied.²⁵² The case recognized that in New York the equitable conversion rule throws upon the purchaser the risk that the land may be condemned after contract and prior to closing. The court properly refused to apply the rule where the option had not been exercised prior to the condemnation, and refused the purchaser damages because of impossibility of performance. The opinion failed to note that condemnation in New York is now one of the risks of loss covered by that state's version of the Uniform Vendor and Purchaser Risk Act.²⁵³

A Kansas decision dealing with flood damages placed risk of loss upon the purchaser where by the terms of the contract the purchaser was entitled to possession and at the time of the loss either had actually taken possession or was preparing to do so.²⁵⁴

The explanation of the equitable conversion rule by the analogy to a trust is once again demonstrated to be misleading in an article²⁵⁵ criticizing a Canadian decision.²⁵⁶

²⁴⁹ *Sabin v. Rauch*, 75 Ariz. 275, 255 P.2d 206 (1953).

²⁵⁰ *Youngblood v. Gholson*, 255 S.W.2d 603 (Ky. 1953).

²⁵¹ *Kennedy v. Rosecrans Gardens, Inc.*, 114 Cal. App.2d 87, 249 P.2d 593 (1952).

²⁵² *Brooks v. Yawkey*, 200 F.2d 663 (1st Cir. 1953).

²⁵³ N.Y. Real Prop. Law § 240-a (1936). Cf. *Reife v. Osmers*, 252 N.Y. 320, 169 N.E. 399 (1929). See Note, 22 U. of Cin. L. Rev. 90 (1953) (lessee with option to purchase; effect of eminent domain).

²⁵⁴ *Torluemke v. Abernathy*, 174 Kan. 668, 258 P.2d 282 (1953).

²⁵⁵ MacIntyre, *Modern Consequences of Earlier Confusion between a Vendor's Lien and the Interest of a Cestui Que Trust*, 30 Can. B. Rev. 1016 (1952).

²⁵⁶ *Gordon v. Hipwell*, [1951] 2 D.L.R. 733 (B.C. Sup. Ct.), aff'd, [1952] 3 D.L.R. 173 (B.C. Ct. App.).

Rights of Third Parties.—The established equity rule is that as between two purchasers under executory contracts for the conveyance of the same land, the purchaser under the contract prior in time prevails unless the subsequent purchaser acquires the legal title for value and in good faith. In a Massachusetts case purchaser number two knew of the prior contract and agreed that his contract would be null if the prior contract was consummated prior to the agreed date for its expiration. The court dealt with the effect of a subsequent agreement by the vendor to extend the time for performance of contract number one upon slightly different terms and for an added consideration. The court solved the problem by finding that the extension agreement was a new contract, hence contract number three in point of time, and that purchaser number two had priority.²⁵⁷

In Wisconsin the court has dealt with the problem of the tenant in possession of land who enters into an unrecorded contract to purchase the land from his lessor. It is clear that the lessor's subsequent grantee without actual notice of the contract must take subject to the possessor's known rights as lessee, but is possession also notice of his contract claim? So the court held.²⁵⁸

While a purchaser under an executory contract is entitled to an injunction pending closing to prevent a disabling conveyance by the vendor, the injunction should by its terms permit the vendor to convey or encumber his interest subject to the contract.²⁵⁹ Nor can a purchaser claim breach of the contract by a disabling conveyance where the vendor has conveyed the legal title to a grantee to whom the vendor also assigned his rights under the contract.²⁶⁰

Remedies of Vendors and Purchasers.—A vendor who seeks specific performance against a purchaser in default is entitled at the vendor's election to claim interest on the purchase money or to relinquish that claim and retain the rents and profits during the period in which the purchaser's performance was delayed. But the vendor may not claim both items in his decree for specific performance.²⁶¹

Where the contract calls for conveyance of land of specified acreage and the sale was by quantity, if there is a material deficiency in the quantity of the vendor's land, the purchaser may claim a conveyance with an abatement in price to compensate for the deficiency.²⁶² This is true even if the purchaser viewed the land and its boundaries.²⁶³

²⁵⁷ Segal v. Prior, 329 Mass. 504, 109 N.E.2d 161 (1952).

²⁵⁸ Miller v. Green, 264 Wis. 159, 58 N.W.2d 704 (1953).

²⁵⁹ Watson v. Chapman, 55 N.W.2d 555 (Iowa 1952).

²⁶⁰ Lancaster v. Robinson, 256 S.W.2d 330 (Ark. 1953).

²⁶¹ Scarlata v. Finazzo, 125 N.Y.S.2d 110 (Sup. Ct. 1953).

²⁶² Schleicher County v. Hudgens, 255 S.W.2d 927 (Tex. Civ. App. 1952); 3 American Law of Property 152.

²⁶³ Cates v. Owens, 87 Ga. App. 270, 73 S.E.2d 345 (1952).

Where an executory contract has been partially performed by the purchaser by payments made by him prior to default, the vendor is clearly entitled to foreclose a vendor's lien. Whether he is entitled to terminate the contract by notice and to recover possession, retaining the partial payments, depends upon extent of the forfeiture involved. Both the rental value during the purchaser's possession and the value added by the purchaser by improvements are material factors.²⁶⁴

IV

MINERAL LAW

Among the small number of mining law questions raised during the past year, the construction of mineral reservations received the principal attention of the courts and text writers. Of special interest is a note²⁶⁵ discussing the various meanings that have been given to "mineral" in a reservation, and speculating whether pitchblende, of commercial value in recent years only, was included in early "mineral" reservations. In *Eldridge v. Edmondson*²⁶⁶ a reservation of a royalty in "oil, gas, casinghead gas and other minerals" was construed to exclude limestone deposits that could be mined only by destroying the surface.

Other cases held that a reservation of a right to mine and remove coal did not authorize strip mining or other unusually destructive extraction methods,²⁶⁷ and that a right of ingress for the purpose of removing coal did not waive liability for such damages as resulted from the intrusion of dirt, rock and other materials from grantor's adjoining operations.²⁶⁸ The right of a mineral fee holder to use the containing space from which all minerals have been removed or use strata that have never contained minerals for gas reservoirs was also explored.²⁶⁹

V

OIL AND GAS LAW

In this rapidly changing area of law, the past year again produced an extensive examination by courts and text writers into the nature and characteristics of the various oil and gas interests, the

²⁶⁴ *Williamson v. Smith*, 256 P.2d 784 (Idaho 1953); *Asher v. Hull*, 207 Okla. 478, 250 P.2d 866 (1952); *Jenkins v. Conn*, 256 S.W.2d 221 (Tex. Civ. App. 1953).

²⁶⁵ Cowie, *Pitchblende: Will It Be Considered Included under our Older Mineral Reservation?*, 14 U. of Pitt. L. Rev. 254 (1953).

²⁶⁶ 252 S.W.2d 605 (Tex. Civ. App. 1952).

²⁶⁷ *Rochez Bros. v. Duricka*, 374 Pa. 262, 97 A.2d 825 (1953).

²⁶⁸ *Oresta v. Romano Bros.*, 73 S.E.2d 622 (W. Va. 1952).

²⁶⁹ *Tate v. United Fuel Gas Co.*, 71 S.E.2d 65 (W. Va. 1952); see Comment, 55 W. Va. L. Rev. 72 (1952).

express and implied rights and obligations of lessor and lessee, the rights of independent mineral and royalty owners, and the operation and effect of state conservation laws. Of the many articles and books published on these topics, Professor Kulp's simple, but exhaustive, treatment of oil and gas in Part X of the *American Law of Property*,²⁷⁰ the 1953 Southwestern Legal Foundation's Fourth Annual Institute in Oil and Gas Law and Taxation, and the *Kansas City Law Review's* Symposium on Oil and Gas²⁷¹ were outstanding. Other valuable articles collected the significant oil and gas decisions in jurisdictions of new or expanding production and analyzed them for the guidance of local attorneys.²⁷²

Leases and Leasehold Interests.—The nature of the oil and gas lessee's interest has long perplexed the courts of oil-producing states. Some have called it real property, others personal property; some have described it as an incorporeal hereditament, others as corporeal; and all have variously characterized it as a determinable fee, a *profit à prendre* or a license to explore. In the midcontinent and Rocky Mountain theaters, where an absence of an integrated case law requires operators to proceed on hunch rather than stare decisis, a great amount of interest was shown in the theories of oil and gas ownership and in the consequences that might be expected from denominating the lessee's interest one thing rather than another.²⁷³ No cases appeared, however, to alleviate any of the uncertainty. Several clauses commonly found in current oil and gas leases were interestingly construed. Where a lease called for production in paying quantities to extend it beyond its primary term, the Louisiana court defined "paying quantities" as an amount sufficient to pay the operating costs of the lessee plus an *adequate* consideration to the lessor.²⁷⁴ The ade-

²⁷⁰ Since this monograph escaped commendation in the oil and gas portion of last year's Survey, 1952 Annual Surv. Am. L. 492, 28 N.Y.U.L. Rev. 555 (1953), which Professor Kulp prepared, and has been acclaimed by oil and gas attorneys as the most significant contribution to oil and gas research materials in years, it is fitting that it be noted in the present Survey. The monograph, with a 71-page supplement, will soon be available in a separate binding.

²⁷¹ 21 Kan. City L. Rev. 1 (1952).

²⁷² See Everett, Wyoming Decisions Relative to the Law of Oil and Gas and Comments with Respect to Form "88" Leases, 6 Wyo. L.J. 223 (1952); March, The Interest of Landowner and Lessee in Oil and Gas in Colorado, 25 Rocky Mt. L. Rev. 117 (1953). See also Lewis, The Canadian Petroleum and Natural Gas Lease, 30 Can. B. Rev. 965 (1952). For a critique of the public land, mineral lease and land office practices, see Malone, Oil and Gas Leases on Federal Lands, 14 Mont. L. Rev. 20 (1953).

²⁷³ See March, *supra* note 272; Shepherd, Oil and Gas Leasehold and Other Estates, 14 Mont. L. Rev. 1 (1953); Note, 1 Kan. L. Rev. 364 (1953). See also Laycraft & Head, Theories of Ownership of Oil and Gas, 31 Can. B. Rev. 382 (1953); Note, The Effect of Theories of Ownership upon the Remedies of an Oil and Gas Lessee, 27 Notre Dame Law. 613 (1952).

²⁷⁴ Noel Estate v. Murray, 65 So.2d 886 (La. 1953).

quacy of the lessor's royalty was determined by comparing it to the initial bonus and the annual delay rentals which the court reasoned were the annual considerations for which the lessor had agreed to give a lease. It was held, however, that such production on a portion of the leased acreage that was assigned during the primary term would not extend the lease on the portion of the acreage which the assignor retained.²⁷⁵ But in *Scott v. Pure Oil Co.*²⁷⁶ the fifth circuit ruled that where a lease allows pooling, and a portion but not all of the leased acreage is pooled with other lands, production from any part of the pooled tract, whether upon the acreage subject to the particular lease or not, will extend both pooled and unpooled portions of the leasehold beyond the primary term of the lease.

Where an habendum clause of a mineral deed provided that the grantee's interest should last so long after a stated primary term as oil or gas was *found* on the premises, it was held in *Owens v. Day*²⁷⁷ that *found* was used in the sense of *produced* and that the grantee could not continue his interest after a cessation in production in order to conduct further exploratory operations.

A shut-in gas royalty clause permitting a lessee to extend his lease beyond its primary term without production by paying fifty dollars a year for each gas well that was potentially productive but inoperative for want of a gas market was held to be exercisable at the lessee's option only. Where the lessee extended his lease on the basis of production from other wells, he was not required in *Sohio Petroleum Co. v. V.S. & P.R.R.*²⁷⁸ to pay the agreed fees on his shut-in gas wells.

Since 1943 a number of Oklahoma and federal cases have indicated that a lessor in Oklahoma can insist on substantially continuous development and can treat any unreasonable interruption in drilling or testing new sands as a breach of the lessee's implied covenant of development. It has been said that such lessor *need not prove as a condition precedent to establishing the lessee's breach that further development might be expected to result in profitable production*. This year Professor Merrill surveyed the recent cases on this point, and concluded that the probable profitability of additional wells has always been only one of many factors to be considered in measuring the

²⁷⁵ *Ibid.* On the other hand, production from a well which was drilled under a pre-existing lease was held in *West v. Continental Oil Co.*, 194 F.2d 869 (5th Cir. 1952), 31 Texas L. Rev. 342 (1953), to satisfy the express drilling requirement of the current lease and release the lessee from his delay-rental obligations.

²⁷⁶ 194 F.2d 393 (5th Cir. 1952), 31 Texas L. Rev. 75.

²⁷⁷ 207 Okla. 341, 249 P.2d 710 (1952).

²⁷⁸ 222 La. 383, 62 So.2d 615 (1952). See *Moses, Problems in Connection with Shut-in Gas Royalty Provisions in Oil and Gas Leases*, 27 Tulane L. Rev. 478 (1953).

obligations of the reasonably prudent operator, and that Oklahoma has not therefore departed in fact from the prudent operator standard.²⁷⁹ In *Gregg v. Harper-Turner Oil Co.*,²⁸⁰ however, the tenth circuit again declared that the later cases leave no doubt that the prudent operator rule is no longer the true test of proper development in Oklahoma. Although saying that the lessor, in the event of unreasonable delays in development operations by the lessee, need not prove the profitability of additional wells, it measured the reasonableness of the lessee's delay by reference to the amount of activity on adjoining lands and to the character of geological data on the potential of the underlying structure.

Mineral Fee and Royalty Interests.—The scope of surface and mineral rights which are appurtenant to a severed mineral estate was before the courts on several occasions during the year. In the absence of an express requirement in his deed or lease, the mineral owner was held to have no duty to fence his machinery as a protection against injury to the animals of the surface owner.²⁸¹ He was given the exclusive right, moreover, to use the surface for oil and gas operations. In *Hancock Oil Co. v. Meeker-Garner Oil Co.*,²⁸² the Oklahoma court, upon petition of a mineral claimant, voided an easement which the overlying surface owner had given to another to erect a derrick on the surface and to slant drill into an adjoining lot. Although the derrick and hole in no way interfered with the plaintiff's operations, he was permitted to restrain all surface uses that would tend to drain oil from the underlying sands. In *Central Kentucky Natural Gas Co. v. Smallwood*,²⁸³ plaintiff was also given the exclusive right to use or lease subsurface gas storage reservoirs. Where a lease containing the usual lesser-interest clause had been executed by the owner of the surface and half of the mineral rights for gas storage purposes, the lessor was limited to the share of the rentals that were apportionable to his mineral interest on the basis that gas returned to the ground for storage becomes native and subject to the rights of mineral rather than surface claimants.

Although mineral-fee interests are generally perpetual, they may

²⁷⁹ Merrill, *The Prudent Operator and Further Development—Oklahoma Rule*, 5 Okla. L. Rev. 453 (1952). See also Moses, *The Effect of Louisiana's Conservation Statute on the Doctrine of Implied Covenants in Oil and Gas Leases*, 27 Tulane L. Rev. 313 (1953).

²⁸⁰ 199 F.2d 1 (10th Cir. 1952).

²⁸¹ *Trinity Production Co. v. Bennett*, 258 S.W.2d 160 (Tex. Civ. App. 1953).

²⁸² 118 Cal. App.2d 379, 257 P.2d 983 (1953). But cf. *Humble Oil & Refining Co. v. L. & G. Oil Co.*, 259 S.W.2d 933 (Tex. Civ. App. 1953) (upholding permit of railroad commission to drill directionally deviated wells from land under mineral lease to another).

²⁸³ 252 S.W.2d 866 (Ky. 1952)

be limited by the habendum clause of the mineral deed. The Oklahoma court recently declared, however, that even where a grant is limited to a twenty-five-year term, the grantee can execute mineral leases that may extend by production beyond the life of his interest.²⁸⁴ It likened a term mineral-fee interest to an agreement that the grantee reconvey his interest at its expiration date subject to existing leases. A contract for a division of royalties on a different basis than fee ownership, the duration of which was not expressed, was construed by the same court to be terminable at the will or upon the death of either party notwithstanding the payment of a valuable consideration for the agreed apportionment.²⁸⁵

A reserved royalty interest which is tied to the life of an existing lease is an interest in real property, but according to the Louisiana court is not a servitude upon the land that would be cut off by ten years of nonenjoyment.²⁸⁶ Where such a royalty is granted in a portion only of a tract under a lease containing an entireties clause, and a producing well is drilled on the portion subject to the assigned royalty, an ambiguity exists as to whether the royalty interest attaches to gross production from such acreage or to only so much of the production as is assignable thereto under the entireties clause. In *Iskian v. Consolidated Gas Utilities Corp.*²⁸⁷ an assignment of an undivided one-fourth interest in the one-eighth royalty in oil and gas produced from the east half of the acreage under such a lease was held to pass one-thirty-second of gross production rather than the one-sixty-fourth that would have passed had the entireties clause been applied to the apportionment.

State Regulation.—The powerful Texas Railroad Commission was denied the right to shut down completely nonwasteful wells in a field in order to prevent drainage from the lands of those whose wells it had closed for want of a market for the casinghead gas that was a necessary by-product of oil production. In *Railroad Commission v. Rowan Oil Co.*²⁸⁸ the court approved the Commission's order shutting down wasteful wells and authorized it to regulate the flow from non-wasteful wells to protect correlative rights, but declared such regu-

²⁸⁴ *Peppers Refining Co. v. Barkett*, 256 P.2d 443 (Okla. 1953).

²⁸⁵ *Snider v. Snider*, 255 P.2d 273 (Okla. 1953); cf. *Rex Oil & Gas Co. v. Busk*, 335 Mich. 368, 56 N.W.2d 221 (1953) (option to purchase oil did not specify term; held, right to last for reasonable period).

²⁸⁶ *Ascher v. Midstates Oil Corp.*, 222 La. 812, 64 So.2d 182 (1953). See also *Mays v. Hansbro*, 222 La. 957, 64 So.2d 232 (1953) (held prescriptive period on lease servitude in Louisiana interrupted by any production on the leased acreage, whether profitable or not).

²⁸⁷ 207 Okla. 615, 251 P.2d 1073 (1952).

²⁸⁸ 259 S.W.2d 173 (Tex. 1953).

lation would have to fall short of a complete shutdown even though some drainage might possibly occur as a consequence.

Among the many other cases involving the construction and application of regulatory statutes that were decided during the year, two are certain to attract attention. In the first, *Richfield Oil Corp. v. Crawford*,²⁸⁰ the California Supreme Court construed a statute requiring wells to be set back 100 feet from property boundaries to apply to the surface location of the wells and not to the producing interval. Thus, it held that a well drilled diagonally into the forbidden hundred-foot area from a surface point 200 feet from the boundary complied with the set-back statute. In the second case, *Superior Oil Co. v. Beery*,²⁸¹ a Mississippi statute providing for the establishment of drilling units by the Mississippi Oil and Gas Board was held to be a compulsory pooling statute. The court permitted a lessee under a lease that did not permit the pooling of the lessor's interest, and over the lessor's objection, to form a drilling unit and extend his lease beyond its primary term by a well upon another part of the unit acreage. It further held that the lessee represented all mineral and royalty interests in the drilling and spacing of wells and that notice to the lessor was consequently unnecessary for the establishment of a drilling unit. In a strong dissent, Justice Lotterhos pointed out that the Board had no compulsory pooling powers before 1950 and that the lessee should have been required to work out a voluntary agreement with his lessor or apply for an exception to the spacing order to prevent the confiscation of his leasehold estate.

Miscellaneous.—Law review contributors also discussed the economic incentives for and the legal aspects of unitization,²⁸² tax planning before drilling,²⁸³ percentage depletion under the federal income tax law,²⁸⁴ and unauthorized uses of confidential oil information.²⁸⁵ The Wyoming severance tax was construed to be a personal property tax upon the oil. One case held that a proportionate share of the tax was chargeable against the lessor's royalties notwithstand-

²⁸⁰ 39 Cal.2d 729, 249 P.2d 600 (1952), criticized in 5 Stan. L. Rev. 369 (1953).

²⁸¹ 216 Miss. 664, 64 So.2d 357 (1953). See also Hardwicke, Oil-Well Spacing Regulations and Protection of Property Rights in Texas, 31 Texas L. Rev. 99 (1952).

²⁸² See Hinkle, Some Legal Aspects of the Unitization of Federal, State and Fee Lands, 14 Mont. L. Rev. 49 (1953); Merrill, Recent Unitization Cases, 6 Okla. L. Rev. 168 (1953). See also Kaveler, Conclusions from Experience, 21 Kan. City L. Rev. 2 (1952).

²⁸³ See Jackson, Tax Planning Before Drilling: The Operator's Problem, 27 Tulane L. Rev. 21 (1952).

²⁸⁴ See Austin, Percentage Depletion: Its Background and Legal History, 21 Kan. City L. Rev. 22 (1952); Mahin, Legal Problems in Connection with Percentage Depletion, 21 id. at 31.

²⁸⁵ See Moses, Unauthorized Use of Confidential Oil Information, 27 Tulane L. Rev. 466 (1953).

ing a lease provision that the lessee should pay all taxes assessed and levied upon the land.²⁹⁵

VI

WATER LAW

Riparian Rights.—The effect of the Federal Power Act²⁹⁶ upon the correlative rights of riparian proprietors, where one is licensed by the Federal Power Commission to develop the power resources of a navigable stream and another is not, was considered this year by the Court of Appeals for the District of Columbia on review of an order of the Federal Power Commission. Although the provisions of the Federal Power Act that require such licenses have heretofore been held constitutional as a reasonable exercise of the navigation power,²⁹⁷ no case has resolved the question whether the licensed party need compensate those who are not licensed for the loss of their riparian power rights. In deciding that the Niagara Mohawk Power Corporation could not deduct as a proper expense the rentals it was paying for the use of the power privileges of other unlicensed riparians, the Federal Power Commission had declared that there was no private ownership of the waters of a navigable stream and that unlicensed riparians consequently did not possess a lawful title that needed to be compensated.²⁹⁸ The decision applied the principle that one riparian cannot claim damages from another unless he has been unreasonably deprived of a lawful exercisable use of the water by the latter's operations. Upon appeal, however, the court of appeals approved the expenditures²⁹⁹ on the basis that Section 27 of the Federal Power Act preserves all rights to water that have vested under state law and that the unlicensed riparians had rights, whether exercisable or not, that were justifiably leased by Niagara Mohawk. The question is now before the Supreme Court on certiorari.³⁰⁰

In *United States v. Fallbrook Public Utility District*³⁰¹ Judge Yankwich ruled that military uses were reasonable riparian uses and that the United States consequently could divert, over the objection of junior appropriators, all the water of the Santa Margarita River it

²⁹⁵ Oregon Basin Oil & Gas Co. v. Ohio Oil Co., 248 F.2d 198 (Wyo. 1952). See also Note, Legal Aspects of Severance Taxes on Petroleum Resources, 29 N.D.L. Rev. 279 (1953).

²⁹⁶ 41 Stat. 1063 (1920), as amended, 16 U.S.C. §§ 791 et seq. (1946).

²⁹⁷ United States v. Appalachian Power Co., 311 U.S. 377 (1940).

²⁹⁸ Niagara Falls Power Co., 9 F.P.C. 228 (1950).

²⁹⁹ Niagara Mohawk Power Corp. v. FPC, 202 F.2d 190 (D.C. Cir. 1952).

³⁰⁰ 345 U.S. 955 (1953). An exhaustive analysis of the Federal Power Commission and court of appeals decisions is found in Schwartz, *Niagara Mohawk v. FPC: Have Private Water Rights Been Destroyed by the Federal Power Act?*, 102 U. of Pa. L. Rev. 31 (1953).

³⁰¹ 110 F. Supp. 767 (S.D. Cal. 1953).

needed for the washing of vehicles and the domestic needs of the 105,000 men it intended to station at riparian Camp Pendleton. By stipulation the United States withdrew from the proceeding any claims it might have to the water other than as a riparian proprietor.³⁰²

An Ohio decision limited a spring owner to riparian rather than proprietary rights where the spring waters flowed in a channel to and upon lower land.³⁰³ And notwithstanding the New York rule that a riparian has the exclusive right to the use of nonnavigable waters that overlie his land, a New York court refused an injunction against trespass to the owner of a lake bed where his ownership was so broken by other titles as to make the enforcement of the injunction unfeasible.³⁰⁴

Underground Waters.—Ground-water rights and regulations retained a prominent place in water-law discussions during the past year.³⁰⁵ A year ago by a three-to-two decision in *Bristor v. Cheat-ham*³⁰⁶ the Arizona court repudiated all common-law proprietary ground-water doctrines and declared that the rule of appropriation has always governed the acquisition of private rights in nontributary percolating water in that state. It stated that any other rule would shackle the Legislature from enacting an underground-water code to prevent the exhaustion of ground-water supplies. Upon rehearing this year,³⁰⁷ the court in another three-to-two decision shifted back to a reasonable-use doctrine. It was persuaded that such a rule had been adopted in earlier decisions, had been relied upon by water users, and should not be displaced at this late date. By its own statement in the earlier *Bristor* decision, it has accordingly barred effective conservation measures and has left the constitutionality of the present and contemplated Arizona ground-water codes in doubt.

Expulsion of Excess Waters.—The courts were confronted with the normally heavy volume of cases that arise from the obstruction, deflection and expulsion from land of unwanted stream, flood and surface waters. Of greatest interest among these was *Jarvis v. Cornett*³⁰⁸ in which the Kentucky court permitted an upper landowner to accelerate and increase the natural flow of surface water onto lower lands

³⁰² On this question see Note, Federal Ownership of Inland Waters: The Fallbrook Case, 31 Texas L. Rev. 404 (1953).

³⁰³ Conobre v. Fritsch, 92 Ohio App. 520, 111 N.E.2d 38 (1952).

³⁰⁴ Waters of White Lake v. Fricke, 282 App. Div. 333, 123 N.Y.S.2d 400 (3d Dep't 1953).

³⁰⁵ Hutchins, Legal Ground Water Problems, National Reclamation Ass'n (1953); Scurlock, Constitutionality of Water Rights Legislation, 1 Kan. L. Rev. 298 (1953); Comment, The Law of Underground Water, [1953] Wis. L. Rev. 491.

³⁰⁶ 73 Ariz. 228, 240 P.2d 185 (1952).

³⁰⁷ 75 Ariz. 227, 255 P.2d 173 (1953), 26 Rocky Mt. L. Rev. 104.

³⁰⁸ 257 S.W.2d 524 (Ky. 1953). For a survey of the Missouri cases on surface waters see Note, 18 Mo. L. Rev. 74 (1953).

so long as he did not add water from other watersheds, or divert water from natural drainage ways. The Nebraska court, on the other hand, retreated from its position that temporary ponds can be drained without liability, by holding in *Rudolph v. Atkinson*⁸⁰⁹ that such drainage is unprivileged if it causes water to collect in a pool upon the lower lands. In like manner the Washington court qualified its general rule that flood water is surface water and can be deflected upon other land by license of the common-enemy surface-water doctrine. In *Sund v. Keating*⁸¹⁰ it held such water to remain stream water so long as it flowed within the flood plain of the source stream, and charged with damages an excavator whose removal of a natural ridge barrier permitted the flood waters to inundate the plaintiff's land.

Miscellaneous.—A fifth circuit decision⁸¹¹ upheld the power of a Texas irrigation district to tax all property interests within its boundaries without regard to the presence or absence of benefits thereto from the district projects. It held that the owner of a severed mineral estate could not, therefore, complain that he is taxed without any benefit from the reclamation and irrigation of surface lands. Other cases and law review comments gave attention to the administration of appropriation rights,⁸¹² the conflicting interests of riparians and the state to the beds of navigable waters,⁸¹³ the continuing licensing power of the Federal Power Commission over projects that have been approved by Congress in a river-basin development plan,⁸¹⁴ the right of an individual to claim compensation for interference by the Federal Government with his water rights on nonnavigable streams,⁸¹⁵ and the right of a municipality to put chemicals into public water supplies.⁸¹⁶

⁸⁰⁹ 156 Neb. 804, 58 N.W.2d 216 (1953).

⁸¹⁰ 259 P.2d 1113 (Wash. 1953).

⁸¹¹ *Hydrocarbon Production Co. v. Valley Acres Water Dist.*, 204 F.2d 212 (5th Cir. 1953).

⁸¹² *Quirico v. Hickory Jackson Ditch Co.*, 126 Colo. 464, 251 P.2d 937 (1952), 25 Rocky Mt. L. Rev. 239 (1953) (qualified four-year statute of limitations on opening adjudication decrees); *Colorado Springs v. Yust*, 126 Colo. 289, 249 P.2d 151 (1952), 25 Rocky Mt. L. Rev. 236 (1953) (reduced burden of negating all damage by petitioner for change of point of diversion). For a discussion of the uncertainties which surround the allocation of water to contract customers by irrigation ditch companies in Texas, see Roberts, Problems Connected with the Distribution of Irrigation Water in Texas, 31 Texas L. Rev. 373 (1953).

⁸¹³ *Bingenheimer v. Diamond Iron Mining Co.*, 54 N.W.2d 912 (Minn. 1952) (state's title to beds of navigable bodies of water limited to such as were navigable in fact and not privately owned at the time when the state was admitted into the Union). On the effect that a change in course of a navigable stream has upon oil leases which the state has previously given to the state-owned beds, see Kreager, The Riparian Possibility of Reverter, 31 Texas L. Rev. 312 (1953).

⁸¹⁴ *United States ex rel. Chapman v. FPC*, 345 U.S. 153 (1953).

⁸¹⁵ Hyatt, Western Water Rights: May They Be Taken without Compensation?, 13 Mont. L. Rev. 102 (1952).

⁸¹⁶ Dietz, Fluoridation and Domestic Water Supplies in California, 4 Hastings L.J. 1 (1952).

MORTGAGES

GODFREY E. UPDIKE

CHANGE in the law of mortgages is difficult to ascertain in most individual years. 1953 was no exception. However, practitioners in the mortgage field gradually develop new techniques to fit particular needs which can be observed over the perspective of a longer period. Thus, the following remarks, while discussing the few significant cases of the year, are directed more particularly toward noting—and questioning—the tendency toward increased use of the deed in security transactions, and the increasing recognition of the advantages of the open-end home mortgage to secure future advances.

Deeds Absolute as Mortgages in Equity.—The substantial volume of cases involving this problem support the impression that use of the deed in security transactions is a common practice. In several of this year's cases, the record shows that the documents were prepared by members of the bar. In one case, the lawyer who prepared the documents testified that the deed was used instead of a mortgage in order to avoid the delay and expense of foreclosure in the event of default.¹ Is use of this device prudent in the light of the attendant risks?² The evidence in favor of the mortgage relation must be clear and convincing,³ but where there is a concurrent

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¹ *Revely v. Hatcher*, 252 S.W.2d 60 (Ky. 1952). Query: Was the lawyer's objective praiseworthy?

² Included among these risks are the following: protracted and expensive litigation brought by grantor to establish the security relation; the hazard of what the mortgagor may testify to, and the trier of fact believe, as to the terms of the oral mortgage arrangement; the difficulties under the recording acts of determining whether to record as a deed or as a mortgage, with possible risk of loss of priority; the onerous duty to act prudently and to account strictly, attendant upon possession under the deed. *Osborne, Mortgages* § 71 (1951). See *State ex rel. Comm'rs of Land Office v. Sparks*, 253 P.2d 1070 (Okla. 1953), where mortgagor's defense of damages through mismanagement by plaintiff mortgagee while in possession was offset against the mortgage debt to the extent of more than 50 per cent.

³ *Winston v. Dixon*, 67 So.2d 1 (Ala. 1953); *May v. Alsobrook*, 253 S.W.2d 29 (Ark. 1952); *Shirley v. Shirley*, 209 Ga. 366, 72 S.E.2d 719 (1952); *Betts v. Rogers*, 173 Kan. 613, 250 P.2d 801 (1952); *Maas v. Maas' Adm'r*, 255 S.W.2d 497 (Ky. 1952), 28 N.Y.U.L. Rev. 1326 (1953); *Emmons v. Emmons*, 64 So.2d 753 (Miss. 1953) (retention of possession and cultivation for more than forty years); *Sargent v. Hamblin*, 260 P.2d 919 (N.M. 1953); *Gilpatrick v. Hatter*, 258 P.2d 1200 (Okla. 1953) (retention of possession, payment of taxes, collection of rents and grantee's admission).

Cf. *Massow v. Gianacis*, 260 P.2d 655 (Cal. App. 1953), where the evidence on all issues (for the most part testimonial) was highly conflicting. The appellate court affirmed a judgment in favor of the mortgage relation, on the ground that there was substantial

document for repurchase at the option of the grantor, the form of the transaction seems to lend some support to the mortgage claim, and the proof requirement is not so rigorous.⁴ In both situations, however, proof of indebtedness by the grantor to the grantee subsequent to delivery of the deed seems indispensable,⁵ unless, at least, the other proof clearly shows that the parties intended a mortgage transaction.⁶

Deed Absolute after Mortgage Perfected.—In lieu of foreclosure, a deed to the mortgagee with option in the mortgagor to repurchase stands upon a different footing. Here, the first question to be answered is this: was the debt extinguished? If a negative answer ensues, the transaction is considered as in the nature of further security, and the mortgage relation is deemed to continue. If the answer is in the affirmative, the next question is this: was the consideration fair, and the transaction otherwise free from overreaching or oppressive conduct on the part of the erstwhile mortgagee? If the answers here are affirmative, the transaction is given legal effect in pursuance of the documents.⁷

The Obligation: Consideration.—A Massachusetts decision⁸ considers a question not often found in the recent cases, to wit, the necessity of consideration for a legal mortgage. The mortgage, given by a wife as additional security for a debt of her husband, recited

evidence to support it. To the same effect, *Townsend v. Wingler*, 114 Cal. App.2d 64, 249 P.2d 613 (1952); *Wilcox v. Salomone*, 258 P.2d 845 (Cal. App. 1953). In *Childers v. Hudson*, 65 So.2d 131, 135 (La. 1953), where defendant took a deed from a third party as security for the purchase price advanced to plaintiff, the court said of the evidence, "The defendant has not, in law, a bush on which to hang a rag of argument on."

⁴ *Cousins v. Crawford*, 258 Ala. 590, 63 So.2d 670 (1953); *Parrish v. Parrish*, 258 Ala. 13, 61 So.2d 130 (1952).

⁵ *Cousins v. Crawford*, supra note 4; *Lusher v. First Nat. Bank*, 260 S.W.2d 621 (Tex. Civ. App. 1953); *Parrish v. Parrish*, supra note 4; *Sargent v. Hamblin*, 260 P.2d 919 (N.M. 1953); *Winston v. Dixon*, 67 So.2d 1 (Ala. 1953).

⁶ In some cases proof of the debt is tenuous, e.g., *Revely v. Hatcher*, 252 S.W.2d 60 (Ky. 1952), where the instrument collateral to the deed absolute permitted the grantor to remain in possession during his lifetime so long as he paid interest on the amount expended by the grantee, with privilege to "reduce the amount due" by payment of any amount at any time. This privilege was considered sufficient to support the requirement that there must be a debt. The other proof in the case quite clearly showed that a mortgage was intended. In *Borden v. Hall*, 255 S.W.2d 920 (Tex. Civ. App. 1951), the court held that a reference to the transaction as "intended to be a mortgage" contained in the instrument collateral to the absolute deed was sufficient proof of the existence of a debt. It seems likely that evidence of the existence of a personal obligation is required in these cases only for the purpose of showing that a security relation was intended. If this fact be established by other means, proof of personal liability ought not to be required except in those jurisdictions which hold that such liability is indispensable to every mortgage, informal or formal.

⁷ *Donohoe v. Landoe*, 251 P.2d 560 (Mont. 1952).

⁸ *Perry v. Miller*, 112 N.E.2d 805 (Mass. 1953).

that it was given to secure payment of a stated sum, but no note or other obligation was given by the wife and no money or other thing of value was received by her. The judgment of the trial court holding the mortgage null and void for want of consideration was reversed on the ground that the mortgage, as an executed conveyance, was valid to pass the interest of the mortgagor, without any consideration. The significant point is to distinguish between the conveyance and the personal obligation which it is given to secure. The obligation may require consideration, but the mortgage as such does not. Where the obligation is evidenced by a promissory note, the burden of pleading and proving lack of consideration is upon the mortgagor.⁹

The Obligation: Future Advances: Priorities.—A very substantial majority of American courts uphold mortgages given to secure future advances against subsequent encumbrances, to the extent of obligatory and voluntary advances made before notice of the subsequent encumbrance and, to the extent of obligatory advances only, after such notice.¹⁰ In most of the cases involving this principle, the junior encumbrance is subsequent in time. The Supreme Court of Pennsylvania had occasion to consider the principle in relation to a purchase-money mortgage prior in time but subordinated by its terms to a construction-loan mortgage.¹¹ The vendor of a tract of building lots, his purchaser, and the construction-loan lender met together. The vendor delivered the deed, the vendee gave back a purchase-money mortgage and also delivered to the construction-loan lender a mortgage and collateral construction-loan agreement which provided that the advances under the construction-loan mortgage were to be made at specified stages in the progress of the construction work, such payments to be made only if and when the specified stages of the work were completed to the satisfaction of the lender. Thereafter the work commenced. The construction lender made a number of progress payments, some as required by the construction-loan contract, others prior to the time they were due. The construction-loan mortgage went into default and was foreclosed. The controversy centered about priority of allocation of the proceeds of sale. The court held that the documents arising from the single transaction were to be read together, and that the purchase-money mortgage was subordinated to the construction mortgage debt only to the extent of the advances obligatorily made thereunder. The advances made before they were

⁹ Chase Inv. Co. v. Kramer, 243 Iowa 1369, 55 N.W.2d 467 (1952).

¹⁰ Osborne, Mortgages § 118.

¹¹ Housing Mortgage Corp. v. Allied Construction, Inc., 374 Pa. 312, 97 A.2d 802 (1953).

due were not legally compellable,¹² and hence, voluntary, and the purchase-money mortgage was given priority as to them. Two relevant rationales are suggested for limiting priority to obligatory advances.¹³ One, that the mortgagee prior in time ought not to be permitted voluntarily to prejudice the security of the late-coming creditor;¹⁴ the other, the desire to keep the mortgagor's title free for additional mortgages by others, or for sale. Application of either principle justifies the result achieved in the instant case.

The Obligation: Future Advances: The Open-End Mortgage.—

The mortgage to secure future advances is an old and extremely useful device. Its application to construction loans, corporate bonds issued in series, and as security for lines of credit is well known. There seems now to be a new look, engendered in part, perhaps, by the urge to "do it yourself" now engulfing the suburban areas of our country.¹⁵ The new look is the open-end home mortgage, cast in the form of a mortgage to secure future advances. Its advantages, both to borrower and lender, are manifold. Financing the cost of extensive residential repairs, additions and modernization, or the purchase of major household appliances, can be effected at moderate expense in acquisition costs and rate of interest, and the amortization outlays, spread over the period of the land-mortgage term, are usually much less onerous than those required by the short-term personal loan or secondary financing lenders.¹⁶ Advantages to the mortgagee include a substantial source of additional loans to borrowers whose reliability has been established; diminution of short-term overborrowing by mortgagors, with the consequent improvement in delinquent accounts; moderate cost of acquisition, and retention of seasoned loans which might otherwise be replaced elsewhere. The device has aroused substantial public interest, evidenced by articles in *Life*,¹⁷ *House & Home*,¹⁸ *Fortune*¹⁹

¹² No suggestion appears that the advances in question were necessary to preserve the construction mortgagee's security; such advances are classified as obligatory.

¹³ See Osborne, *Mortgages* § 117a.

¹⁴ The court seems to follow this view, pointing out that if payments made before they were due were given priority, advancement of the entire construction loan before any work was done would have rendered the purchase-money mortgage wholly worthless.

¹⁵ This urge has had another consequence not so beneficent. The casualty insurance companies report a substantial increase in accidental personal injuries occurring in and about the home.

¹⁶ For example, a \$2,000 advance added to a mortgage loan with an unexpired term of ten years would be repaid, with interest at 5 per cent, by monthly payments of \$21.22. With a short-term unsecured loan, the monthly payment required would be \$63.80 and the interest rate 9.6 per cent. *House & Home*, April 1953, p. 87.

¹⁷ July 22, 1953, pp. 61-64.

¹⁸ A monthly series of articles July 1952 through August 1953.

¹⁹ September 1949, pp. 18-21. *Fortune* gives credit to Arthur S. Goldman, Director of Marketing and Research of *House & Home* (Architectural Forum), for early recognition of the open-end mortgage as a major instrument of credit in this field. Mr. Gold-

and the daily press. It is reported that some four hundred millions of dollars were loaned in 1951 as additional advances under open-end mortgages.²⁰

The legal principles applicable to such mortgages are the same as those underlying other mortgages given to secure future advances, and so primarily are a matter of local statutory and decisional law.²¹ But there are several points that the lender's counsel may helpfully bear in mind. The mortgage ought to disclose on its face that it is given to secure future advances as well as a present indebtedness²² (if that be the case), and the aggregate amount to be secured at any one time should be stated specifically.²³ Statutory limitations on the amount of loans, in relation to value of the security, made by institutional lenders such as banks and insurance companies, may require reappraisals at the time of the subsequent advance. Statutory requirements as to the quality of the security, *e.g.*, first lien on unencumbered real property, may require extension of the original title investigation down to the date of the new advance, notwithstanding complete satisfaction on the part of the lender as to the financial responsibility of the mortgagor. Many title insurance companies have given encouraging support to the open-end device, and, usually by extension of the original policies, will insure title as of the time of the new advance, the usual charge being one-half of one per cent of the advance, with nominal minimum charges. In order to keep down the expense, it has been suggested that the title companies insure these titles on a casualty basis, relying on an affidavit of the mortgagor that no encumbrances have arisen subsequent to recordation of the mortgage. This may be quite all right for lenders entitled to set their own security standards, but where a statute fixes the standard, the duty to search the record seems plain enough.²⁴

man's publications evince a high order of understanding of the legal problems involved as well as resourcefulness and enthusiasm.

²⁰ House & Home, July 1952.

²¹ 19 Legal Bull. 78 et seq. (Sept. 1953), published by The United States Savings and Loan League, Chicago, Illinois, contains a detailed analysis of the relevant case and statute law in each state, prepared under the supervision of its general counsel, Horace Russell, former general counsel for The Home Owners Loan Corporation. See also Ashley, Mortgages to Secure Future Advances, 31 N.C.L. Rev. 504 (1953).

²² A mortgage naming the total sum to be secured (presently advanced and to be advanced) as a present debt is upheld in most jurisdictions, Osborne, Mortgages § 116, but it contains a representation false in fact, which alone is enough to justify disapproval of its use, and it may be harmfully misleading to subsequent encumbrancers and other creditors of the mortgagor.

²³ This too is desirable as a matter of fairness to creditors and encumbrancers of the mortgagor, but is not mandatory except in the few jurisdictions in which, by statute or rule, a definitive statement of the amount to be secured is indispensable to priority.

²⁴ An examination of the record seems indispensable in any jurisdiction in which mechanics' liens are expressly given priority over subsequent advances, *e.g.*, N.Y. Lien

Transfer of the Mortgagor Interest: Assumption of the Mortgage.

—In an action brought to cancel first and second mortgages placed of record against plaintiff's land, the undisputed facts showed that plaintiff's sister had forged his name to a deed, and thereafter executed and delivered mortgages to good faith encumbrancers for value. This deed and the mortgages were offered and received for record in regular course. The forgery was disclosed to plaintiff, who thereupon promptly notified the mortgagees. An instrument was then prepared and executed by the sister to plaintiff, containing a recital that the conveyance was made "subject to existing mortgages of record which the grantee herein assumes and agrees to pay." Plaintiff made no payments on either of the mortgages. The principal defense asserted was estoppel arising out of acceptance by the plaintiff, and recordation of the deed from his sister containing the assumption clause. The Florida Supreme Court²⁶ found no estoppel by the recitals in the deed, as plaintiff did not claim under it, using it only for the purpose of correcting the record, and no equitable estoppel because there was no evidence of reliance or change of position on the part of the defendant mortgagees. The plaintiff was not bound on his assumption promise, as such, for want of consideration, and there was no element of unjust enrichment.

The Supreme Court of Wisconsin²⁶ denied subrogation to a grantee who assumed payment of a mortgage, and subsequently paid it off, not knowing of the existence of a recorded subordinate lien. The court gave the familiar reason: by assumption the grantee became the primary obligor, and in paying her own debt, could not qualify for subrogation status. Such a view may be appropriate where the grantee expressly assumes both senior and junior encumbrances, or assumes the senior with knowledge of the existence of the junior lien, because there are means available to protect himself if he is unwilling to promote the junior encumbrance to senior security status. Where, however, the grantee assumes and pays off, the senior lien in ignorance of the existence of the junior charge, the only effect is to enrich the junior holder unjustly at the grantee's expense.²⁷

A somewhat analogous situation arises when a first mortgagee takes a transfer of the mortgagor interest in lieu of foreclosure. Destruction of the prior lien ought not to advance the priority of the subsequent lien claimant, and the prior lien ought to be reinstated

Law § 13(1); so, too, of some state or federal liens which may have priority regardless of notice.

²⁶ *Robertson v. Robertson*, 61 So.2d 499 (Fla. 1952).

²⁶ *Fitzgerald v. Buffalo County*, 264 Wis. 62, 58 N.W.2d 457 (1953).

²⁷ *Osborne, Mortgages* § 283. A nonassuming grantee in the same circumstances is entitled to subrogation. *Groves v. George*, 123 N.Y.S.2d 192 (Sup. Ct. 1953).

to prevent unjust enrichment. In Missouri, such a deed in lieu of foreclosure operates as an equitable foreclosure and cuts off the junior claimant if the security at the time of the deed is worth less than the amount secured by the senior lien.²⁸

Transfer of the Mortgagor Interest: Statute of Frauds.—The mortgagor's interest is an interest in land, and it can be transferred, or relinquished to the mortgagee, only by a writing which complies with the relevant Statute of Frauds.²⁹ A decision of the Supreme Court of Arkansas,³⁰ in opposition to this generally accepted principle, holds that actual surrender of possession by mortgagor to mortgagee for a fair consideration (including cancellation of the mortgage debt), with intent to transfer ownership, is sufficient. Some of the cases cited in support of the proposition are chattel cases, which have no relevance in terms of the Statute of Frauds;³¹ others involve parol release or satisfaction of the mortgagor's liability, which is quite another matter.³² The opinion refers to specific performance of verbal contracts for the sale of land where the vendee has entered into possession and paid the price (although no such claim was asserted), and also to the laches of the mortgagor, who lived in the vicinity and stood by in silence for eleven years, during which time several transfers of the land took place and substantial improvements were made. There is some support for the view that it would be inequitable to allow redemption, in the face of a fair bargain for release of the equity of redemption, plus substantial change of position.³³

Redemption from the Mortgage.—One of nine tenants in common was in military service at the time of foreclosure of a mortgage without action, under power of sale, and thus, it was claimed, his right to redeem was not foreclosed. He thereafter brought action to redeem his undivided interest, and (in response to demurrer sustained) amended his action to redeem the entire interest, including the interests of his former cotenants. The Supreme Court of Alabama³⁴ affirmed a decree denying relief, on the ground first, that plaintiff was not

²⁸ *Moses v. Ehrlich*, 64 So.2d 352 (Miss. 1953); *Jaubert Bros., Inc. v. Walker*, 203 Miss. 242, 33 So.2d 827 (1948).

²⁹ *Osborne, Mortgages* § 67.

³⁰ *Gamble v. Johnson*, 256 S.W.2d 46 (Ark. 1953). The mortgage was in form a warranty deed on condition that if the mortgagor paid back the debt, with taxes to come due, and interest "within two years from date, this deed shall become null and void," otherwise to remain in full force and effect.

³¹ Cf., e.g., *Moses v. Ehrlich*, 64 So.2d 352 (Miss. 1953).

³² *Osborne, Mortgages* § 66.

³³ See 23 Ill. L. Rev. 80 (1928).

³⁴ *Cooper v. Peak*, 258 Ala. 167, 61 So.2d 62 (1952), cert. denied, 345 U.S. 957 (1953). For the purpose of discussion, the court assumed that plaintiff came within the protection of The Soldiers' and Sailors' Civil Relief Act of 1940, 54 Stat. 1178 (1940), as amended, 50 U.S.C. App. §§ 501 et seq. (1946).

entitled to redeem in whole, against the will of the erstwhile mortgagee (who was purchaser at the foreclosure sale); and second, that plaintiff was estopped from asserting his right to redeem because he stood by and watched the purchaser improve part of the land, after declining a proposal to purchase part of it. The court seems to have overlooked the principles applicable to this special situation. As the court correctly said, the purchaser at the foreclosure sale acquired the interests of all the parties bound by the sale. In addition, he acquired the interest of the mortgage creditor. From this point on, the emphasis must be given to the relation between purchaser and plaintiff as tenants in common. In these circumstances, plaintiff's duty is to offer to pay only the proportionate amount that his undivided interest would have to contribute.³⁵ So far as the estoppel aspect is concerned, no relation appears which would confer upon the purchaser the right to require plaintiff to purchase a portion of the premises, or impose upon plaintiff any duty to respond to such a suggestion.

A somewhat similar problem came before the Supreme Court of Oklahoma.³⁶ The owner of a mineral interest was not served in the foreclosure action, which none the less went to judgment and sale in 1942. In 1944 the mineral claimant moved to vacate the judgment and for leave to defend, to pay off the indebtedness and to be subrogated to the right, title and interest of the plaintiff, who was purchaser at the foreclosure sale.³⁷ Plaintiff moved to dismiss its action as to claimant, with prejudice. The court approved dismissal with prejudice, holding that such dismissal operated to release claimant's interest from the lien of the mortgage forever, and that, in consequence, there was no need for him to redeem. This drastic step by plaintiff has historic precedent³⁸ but the reasons for it are not clear. Perhaps there was apprehension that defendant, if permitted to re-

³⁵ If plaintiff were required to pay the entire mortgage debt, he would acquire at once a right of reimbursement against the purchaser at the foreclosure sale, now his cotenant, for his pro-rata share of the redemption, and be subrogated to the mortgage in order to collect it. *Osborne, Mortgages* § 305.

³⁶ *State v. Mobley*, 255 P.2d 945 (Okla. 1953).

³⁷ The offer was made in pursuance of Okla. Stat. Ann. tit. 42, §§ 18-19 (1937), which read as follows:

"§ 18. Every person having an interest in property subject to a lien, has a right to redeem it from the lien, at any time after the claim is due, and before his right of redemption is foreclosed.

"§ 19. One who has a lien, inferior to another upon the same property, has a right:

"1. To redeem the property in the same manner as its owner might, from the superior lien; and

"2. To be subrogated to all the benefits of the superior lien when necessary for the protection of his interests, upon satisfying the claim secured thereby."

³⁸ *Mackenna v. Fidelity Trust Co.*, 184 N.Y. 411, 77 N.E. 721 (1906).

deem in full, might be entitled to a conveyance of all the interests acquired by plaintiff at the foreclosure sale, as was indeed the effect of the judgment of the trial court. But, as we have seen, there was no basis for fear in that respect, for the trial court's direction was erroneous. Redemption in full by the defendant would have passed the mortgagee interest to him by subrogation,³⁹ but not the ownership interests in the land acquired by the purchaser at the foreclosure sale.⁴⁰

Defenses: Limitation of Time.—The common-law presumption of payment of the mortgage debt, based upon nonpayment for twenty years, does not arise where the holder of a life interest in the mortgage becomes owner in fee of the mortgaged premises during the twenty-year period. The owner of the fee, theoretically at least, was paying interest to herself during the term of her ownership.⁴¹

Idaho's mortgage-recording statute provides that no record of any mortgage given before July 1, 1945, shall constitute notice to subsequent purchasers or encumbrancers for more than ten years from the date of maturity.⁴² The relevant statute of limitations applied in the instant case was the usual written-obligation statute requiring commencement within five years of accrual of the claim.⁴³

In an action to quiet title, based upon both statutes, the Idaho Supreme Court held⁴⁴ that the protection of the recording statute is not available to persons who purchase with knowledge of the mortgage claim. As to the limitation statute, the court applied the ancient rule that those who seek equity must do equity, and dismissed the plaintiff's claim for failure to offer to pay the debt, notwithstanding the fact that foreclosure was barred.⁴⁵

A new statute, apparently not applied to the case, bars actions for foreclosure if not commenced within five years from the date of maturity as disclosed by the public record.⁴⁶ Professor Basye, in his excellent new book, *Clearing Land Titles*, expresses the hope that this new statute, based upon the record and purporting to be absolute, will be potent in discharging ancient mortgages to the extent, at least, that nothing in the way of disabilities or other facts not of record

³⁹ And thereby entitled him to proportionate contribution from plaintiff.

⁴⁰ Osborne, Mortgages § 305.

⁴¹ Warfield v. Christiansen, 93 A.2d 560 (Md. 1953). There was no discharge by merger, of course.

⁴² Unless a document of extension is recorded, Idaho Code Ann. tit. 55, c. 8, § 55-817 (Supp. 1953).

⁴³ Idaho Code Ann. tit. 5, c. 2, §§ 5-201, 5-216 (1948).

⁴⁴ Trusty v. Ray, 73 Idaho 232, 249 P.2d 814 (1952).

⁴⁵ Following Gerken v. Davidson Grocery Co., 50 Idaho 315, 296 Pac. 192 (1931).

⁴⁶ Idaho Code Ann. tit. 5, c. 2, § 5-214a (Supp. 1953).

will be permitted to extend the time for commencement.⁴⁷ The instant decision, insisting upon payment (or proof thereof) as a condition to cancellation in the circumstances here disclosed, is not so helpful in this respect.

For the conveyancer, there is much to be said in favor of statutes which extinguish the lien by lapse of time within which to bring action on the obligation,⁴⁸ but there is always a twinge of regret when one sees decent and forbearing mortgages undone in the process.⁴⁹

As is so often the case, many of the law review articles and notes published during the year have to do with problems of local law.⁵⁰ Of general interest is an extensive survey of the law and procedures affecting transfers of mortgaged property, including a discussion of fractional sales, marshalling, liability in inverse order, and subdivision financing.⁵¹

⁴⁷ *Basye, Clearing Land Titles* § 90 (1953), reviewed by Patton, 29 N.Y.U.L. Rev. 769 (1954). Section 76 of this work contains a first-rate discussion of the various types of statutes, and of current legislative trends.

⁴⁸ *Id.* § 75.

⁴⁹ *E.g.*, *Harter v. Wollaber*, 116 N.Y.S.2d 464 (Sup. Ct. 1952) (numerous statements admitting the mortgage indebtedness filed with banks for credit purposes); *Carlos Land Co. v. Root*, 282 App. Div. 349, 122 N.Y.S.2d 650 (4th Dep't 1953) (delivery of insurance policy renewal, with loss payable to the mortgagee). Neither was considered a sufficient acknowledgment to toll the statute. In *Harter v. Wollaber*, *supra*, the mortgagor had delivered a fifteen-dollar heifer to the mortgagee on account of an indebtedness of some \$5,000.

⁵⁰ *Dainow, Ranking Problems of Chattel Mortgages and Civil Code Privileges in Louisiana Law*, 13 La. L. Rev. 537 (1953); *Hartman, Motor Vehicle Title and Registration Law; Impact on Chattel Mortgages and Possessory Liens*, 6 Vand. L. Rev. 1049 (1953) (in Tennessee); *Hubbard, Deeds of Trust and Article 66 of the Maryland Code*, 13 Md. L. Rev. 114 (1953); *Murray, Statutory Redemption: The Enemy of Home Financing*, 28 Wash. L. Rev. 39 (1953) (in Washington); *Storke & Sears, Enforcement of Security Interests in Colorado*, 25 Rocky Mt. L. Rev. 1 (1952). See Note, 57 Dick. L. Rev. 125 (1953) (on the Pennsylvania Chattel Mortgage Act of 1945); Recent Case, 101 U. of Pa. L. Rev. 884 (1953) (on industrial plant mortgages in Pennsylvania).

Comparative studies of Tennessee and New York law in relation to the Uniform Commercial Code appeared respectively in Notes, 22 Tenn. L. Rev. 848 (1953), 2 Buff. L. Rev. 297 (1953).

⁵¹ *Storke & Sears, Transfer of Mortgaged Property*, 38 Cornell L.Q. 185 (1953).

FUTURE INTERESTS

BERTEL M. SPARKS

ATENDENCY toward greater uniformity among the several states has been demonstrated by both courts and legislatures within the past year. "Lives in being and twenty-one years" is regaining its position of respect as a measuring period for both the Rule against Perpetuities and the rule against accumulation of income. The theory of permitted reasonable direct restraints upon alienation is losing the slight degree of favor it once enjoyed, and the acceptance of the validity of future legal estates in personalty seems to have become unanimous. The notion that a special power of appointment is presumed to be exclusive is gaining in popularity.

The wait-and-see doctrine applicable to the Rule against Perpetuities has received a favorable nod in one judicial opinion and a careful analytical evaluation in a law review article by Professor Lewis M. Simes.

Defeasible Estates and Reversionary Interests.—Illinois continues to lead the way in restricting the evils of long-continued possibilities of reverter and powers of termination.¹ Significant restrictions upon these interests, including especially a limit of fifty years upon their duration, were adopted in 1947.² More recently a limit of seven years has been placed upon the time within which an action may be brought because of a breach of a condition subsequent or the happening of the event upon which a fee simple subject to a special limitation or a fee simple subject to an executory interest is to terminate.³

Delicate problems of construction often arise out of the effort to determine what words are necessary to the creation of a defeasible fee. The Supreme Court of Michigan has displayed a rather strong tendency to construe provisions in a deed as covenants rather than conditions whenever it is at all possible. A deed conveying real es-

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¹ For an analysis of the social inconveniences created by present rules regarding possibilities of reverter and powers of termination see 6 American Law of Property § 24.62 (Casner ed. 1952); Leach, *Perpetuities in Perspective: Ending the Rule's Reign of Terror*, 65 Harv. L. Rev. 721, 739-45 (1952).

² Ill. Ann. Stat. c. 30, §§ 37b-37h (Smith-Hurd Supp. 1953). See Comment, 43 Ill. L. Rev. 90 (1948).

Similar legislation restricting the period to twenty-one years was adopted in Florida in 1951. Fla. Stat. Ann. § 689.18 (Supp. 1952). Rhode Island has recently limited the duration of possibilities of reverter and powers of termination in that state to twenty years. R.I. Laws 1953, c. 3213.

³ Ill. Ann. Stat. c. 83, §§ 1a-1c (Smith-Hurd Supp. 1953).

tate to a park commission contained eight numbered provisions described as "conditions." The first of these was that the grantee convey the property to the city for park purposes and the last was a provision for reverter if "said proposition is not accepted" by the city. It was held that the reverter clause applied only to the acceptance of the grant by the city and that all the other provisions described as conditions were covenants.⁴ Although a mere statement of purpose contained in a deed does not imply the defeasibility of the estate granted,⁵ there is such a tendency to confuse words of purpose with words of condition that the prudent draftsman will endeavor to avoid words of purpose entirely.

The alienability of a power of termination has been recognized in a Texas case without any argument or dispute on the point.⁶

Worthier Title Doctrine.—A note writer has strongly urged the legislative abolition of the doctrine of worthier title in Illinois.⁷ Tennessee has recognized the inter vivos branch as a rule of property, not a mere rule of construction.⁸ In New York an unsuccessful attempt has been made to add further confusion to the doctrine by arguing that even though a trust instrument contains all the criteria ordinarily necessary for indicating a remainder in the settlor's heirs, a reservation of a power to withdraw a specified amount from the corpus will defeat the remainder as to the whole and leave a reversion in the settlor.⁹

Remainders.—Where a remainder following a life estate is subject to a power presently exercisable, the remainderman is a proper party to bring action to cancel an alleged exercise of the power even while the life tenant is still alive.¹⁰ Although the remainderman has no present right of use or possession and his remainder is subject to complete defeasance, if he is compelled to wait until the time when he has a right to possession it is possible that the property will be in the hands of bona fide purchasers and beyond his reach.

Where land held by a life tenant with remainder over is sold at a foreclosure sale purporting to convey a fee the remainderman's interest is unaffected if the property is acquired either directly or

⁴ Clark v. Grand Rapids, 334 Mich. 646, 55 N.W.2d 137 (1952).

⁵ Fuchs v. Reorganized School Dist. No. 2, 251 S.W.2d 677 (Mo. 1952); Ange v. Ange, 235 N.C. 506, 509, 71 S.E.2d 19, 21 (1952).

⁶ City of Dallas v. Etheridge, 253 S.W.2d 640 (Tex. 1952).

⁷ Note, 47 N.U.L. Rev. 507 (1952).

⁸ Cochran v. Frierson, 258 S.W.2d 748 (Tenn. 1953).

⁹ Hope v. United States Trust Co., 281 App. Div. 52, 117 N.Y.S.2d 540 (1st Dep't 1952).

¹⁰ Willoughby v. Trevisonno, 97 A.2d 307 (Md. 1953).

through mesne conveyances by the life tenant.¹¹ In either event the reacquisition is regarded as a redemption which operates to the benefit of the remainderman as well as the life tenant.

Questions involving the rights of holders of future interests to the protection of the courts while their interests are still future are reasonably familiar. A more intriguing problem might be raised by asking whether the remainderman is ever under a duty to take any affirmative action in order to protect the life tenant from the life tenant's own erroneous judgment. In *Sands v. Kissane*¹² the remainder was contingent upon the remainderman's surviving the life tenant and there was provision that if he failed to survive, the life estate ripened into a fee. Under the erroneous belief that the remainderman was dead the life tenant made extensive improvements upon the property. Upon the life tenant's death the remainderman reaped a bountiful harvest. It was held that he was not unjustly enriched and was under no duty to disclose his identity while the life tenant was still alive. Upon the facts given the decision is undoubtedly sound, but what would be the result if prior to making the improvements the life tenant had made a diligent search for the remainderman who had actual knowledge of the search and of its purpose?

Rule in Shelley's Case.—The legislative abolition of the Rule in Shelley's Case has been accomplished in Illinois¹³ and has been strongly urged in Texas.¹⁴

Future Interests in Personal Property.—It appears that legal future interests may now be created in personal property by either deed or will throughout the United States. This has long been the rule everywhere except in North Carolina where the view has prevailed that although such interests could be created by will they were void if created by inter vivos transfer.¹⁵ The North Carolina position was carefully analyzed and its inconsistency with the general American view was pointed out in a recent case in that state.¹⁶ Shortly after the opinion was issued the Legislature took action to place North Carolina in harmony with other American jurisdictions.¹⁷

Construction.—Among the more significant construction problems that have been found among the cases within the past year have been those dealing with the meaning of the word "heirs" as used

¹¹ *Wheeler v. Kazee*, 253 S.W.2d 378 (Ky. 1952); *Morrow v. Person*, 259 S.W.2d 665 (Tenn. 1953).

¹² 282 App. Div. 140, 121 N.Y.S.2d 634 (3d Dep't 1953).

¹³ Ill. Ann. Stat. c. 30, § 186 (Smith-Hurd Supp. 1953).

¹⁴ *Sybert v. Sybert*, 254 S.W.2d 999, 1001 (Tex. 1953) (concurring opinion).

¹⁵ Gray, *The Rule Against Perpetuities* §§ 91-92 (4th ed. 1942).

¹⁶ *Woodard v. Clark*, 236 N.C. 190, 72 S.E.2d 433 (1952).

¹⁷ N.C. Laws 1953, c. 198.

in various situations. A New Jersey decision has held that a postponed gift to one "or" his heirs designates the heirs as alternative beneficiaries and makes the interest of the first taker in remainder contingent upon his surviving the date of distribution.¹⁸ The same court has held that under very similar circumstances if there is no intervening life estate and the termination of the period of postponement is wholly within the control of the named remainderman his interest is absolute.¹⁹

In *Barnhart v. Barnhart*²⁰ the testator provided for a gift over to his "heirs" after the death of certain named individuals. Since the named individuals included all the testator's lawful heirs, it was held that the testator intended those persons who would have been his heirs if he had died at the date of distribution. But in *Young v. Lewis*²¹ where the gift to heirs was to vest upon the death of a named individual who happened to be one of testator's heirs it was held that "heirs" were to be ascertained at the time of the testator's death and the fact that one such heir was also a life tenant made no difference. The cases can be distinguished but the principle involved is so similar, different results are unlikely should the cases arise in the same court.

Where there is a gift over in the event of death of the first taker without issue Florida still applies the common-law presumption in favor of an indefinite failure construction, but it has been held there that the presumption is overcome by a provision for a gift over if the first taker should die without "children or descendants of children him surviving."²² The point to be regretted is that the common-law presumption is given recognition for any purpose.²³

Connecticut has quite properly construed a gift to be paid at a certain age to be a vested gift payable at the named age or when the beneficiary sooner dies.²⁴

¹⁸ *Brown v. Neeld*, 97 A.2d 718 (N.J. Super. 1953).

¹⁹ *Peterson v. Neeld*, 22 N.J. Super. 469, 92 A.2d 62 (App. Div. 1952) (express power of assignment also given the first taker). In still another case it was unsuccessfully argued that a postponed gift to children "or" their issue was a gift to the children "and" their issue with the children and their issue taking concurrent estates and sharing equally. *Davis v. Vermillion*, 173 Kan. 508, 249 P.2d 625 (1952).

For a general discussion of the effect of postponed dispositions to named remaindermen "or" persons described as heirs, children, issue, or similar expressions see 5 American Law of Property § 21.24.

²⁰ 415 Ill. 303, 114 N.E.2d 378 (1953).

²¹ 76 S.E.2d 276 (W. Va. 1953).

²² *Adams v. Vidal*, 60 So.2d 545 (Fla. 1952).

²³ For a recent case giving strong effect to the presumption see *Caccamo v. Banning*, 75 A.2d 222 (Del. 1950). The modern status of the rule is discussed in 5 American Law of Property § 21.50.

²⁴ *Bridgeport-City Trust Co. v. Lister*, 140 Conn. 147, 98 A.2d 811 (1953).

*Class Gifts and the Requirement of Survivorship.*²⁶—No other aspect of the law of future interests is so filled with uncertainty as that dealing with construction problems arising out of class gifts and provisions for survivorship. Opposite results have been reached in answering the perpetual question whether an express requirement of survivorship attached to a postponed gift refers to surviving the testator or surviving the date of distribution.²⁶ Although the decision that survival of the testator was intended is supported by the constructional preference for early vesting it has little else to commend it and is certainly out of harmony with the natural meaning of the words used.²⁷

Where there is a postponed gift to a class without any express requirement of survivorship there is little uniformity in determining when one will be implied. South Carolina has held that where the class gift is contingent upon death of the life tenant without children it is contingent as to the person and therefore not transmissible.²⁸ The effect seems to be that if there is one express contingency a further contingency of survivorship will be implied. To be contrasted with this view is an Alabama case of a devise to a wife for life and "at her death" to certain named individuals with a gift over if any of the remaindermen "die prior to the above mentioned property vesting in them." It was held that the gift vested in remaindermen at the death of the testator.²⁹ While there is probably room for doubt as to whether the testator was thinking of "vesting in interest" or "vesting in possession" when he said "vesting in them," it is clear that unless an expression of a contrary intent can be found, a postponed gift to a class vests in interest, or minimum membership is determined, at the death of the testator.³⁰ This rule is not altered by the fact that the taker of the particular estate is a member of the class and there is no vesting in possession until his

²⁶ A study of the class gift doctrine in Tennessee is found in McSweeney, *The Tennessee Class Doctrine: A Spectre at the Bar*, 22 Tenn. L. Rev. 943 (1953).

²⁸ *Ellis v. Paxton*, 114 F. Supp. 347 (W.D. Ky. 1953) (gift held contingent upon survival to the date of distribution); *In re Ross' Will*, 281 App. Div. 470, 120 N.Y.S.2d 218 (3d Dep't 1953) (gift vested upon death of the testator). See also *Richardson v. Chastain*, 111 N.E.2d 831 (Ind. 1953), where it was held that a postponed gift to A and B equally with provision for a gift over if either remainderman "should be dead" without children created a vested remainder upon death of the testator.

²⁷ For a general treatment of this troublesome problem see 5 *American Law of Property* § 21.15; 2 *Powell, Real Property* ¶ 328 (1950); *Restatement, Property* § 251 (1940).

²⁸ *Jones v. Holland*, 77 S.E.2d 202 (S.C. 1953).

²⁹ *Springer v. Vickers*, 66 So.2d 740 (Ala. 1953).

³⁰ *Noreen v. Sparks*, 204 F.2d 56 (D.C. Cir. 1953), reversing in part 103 F. Supp. 588 (D.D.C. 1952); 2 *Simes, Future Interests* § 329 (1936). An individual gift to be paid at a certain age does not postpone vesting until arrival at that age. *Clay v. Security Trust Co.*, 252 S.W.2d 906 (Ky. 1952).

death.³¹ The same principle applies where the class consists of a group of persons described as heirs of the testator, "heirs" necessarily being determined at the time of the testator's death.³²

The divide-and-pay-over rule has been applied in Pennsylvania³³ and has been recognized but found inapplicable to the particular case involved in Rhode Island.³⁴

A remainder to a class was found in Arkansas from a conveyance to A "and unto her heirs by her present husband."³⁵ Since A had children at the time of the conveyance it is clear that if any remainder at all was created it was a remainder vested in a class subject to open. Argument contra was to the effect that a fee tail was created.

Powers of Appointment.—The tendency of the Kentucky Court of Appeals to find a special power of appointment to be a nonexclusive power has been reversed. In *Harlan v. Citizens National Bank*³⁶ the court referred to a number of its earlier decisions on this subject as having been wrongly decided and expressly adopted the *Restatement* position³⁷ that the power is exclusive unless the donor manifests a contrary intent.³⁸ The new development is of importance, not only because it brings another jurisdiction into harmony with the weight of authority on this point,³⁹ but also because it provides considerable relief against another minority rule prevailing in Kentucky to the effect that in case of a nonexclusive power each member of the class must be given a substantial share.⁴⁰

A number of interesting problems have been presented in the execution of powers. Unsuccessful arguments have been made that an

³¹ *Security Trust Co. v. Irvine*, 93 A.2d 528 (Del. Ch. 1953).

³² *Young v. Lewis*, 76 S.E.2d 276 (W. Va. 1953). An opposite result might be reached through an application of the divide-and-pay-over rule. In re *Edmunds' Estate*, 374 Pa. 22, 97 A.2d 75 (1953).

³³ In re *Edmunds' Estate*, supra note 32 (rule criticized in a concurring opinion).

³⁴ *Rhode Island Hospital Trust Co. v. Johnston*, 99 A.2d 12 (R.I. 1953).

³⁵ *Steele v. Robinson*, 251 S.W.2d 1001 (Ark. 1952).

³⁶ 251 S.W.2d 284 (Ky. 1952), 51 Mich. L. Rev. 936 (1953).

³⁷ *Restatement, Property* § 360 (1940).

³⁸ There is indication that Kentucky has established a much stronger presumption in favor of an exclusive construction than is called for by the rule announced by the *Restatement*. Compare *Harlan v. Citizens National Bank*, 251 S.W.2d 284, 287-88 (Ky. 1952) with *Restatement, Property* § 360, comment c, illustrations 2-4 (1940).

³⁹ *Frye v. Loring*, 113 N.E.2d 595 (Mass. 1953); 5 *American Law of Property* § 23.57.

⁴⁰ *Barret's Ex'r v. Barret*, 166 Ky. 411, 179 S.W. 396 (1915). The Kentucky position was supported within the past year by dicta in *Massachusetts v. Frye v. Loring*, 113 N.E.2d 595, 599 (Mass. 1953). It is also in accord with the view of the *American Law Institute. Restatement, Property* § 361 (1940). For a general analysis of the doctrine of illusory appointments and an indication of the present state of the authority on the subject see 5 *American Law of Property* § 23.58; 1 *Simes, Future Interests* § 275; *Howe, Exclusive and Nonexclusive Powers and the Illusory Appointment*, 42 Mich. L. Rev. 649, 667-75 (1944).

intent to exercise a power can be found from a residuary trust for support when the residue of the donee's owned property is not sufficient to provide adequate support or from a residuary gift to a principal object of the donee's love and affection when only a small amount of owned property is left for the residue.⁴¹ The intent of both donor and donee was most likely frustrated in a Pennsylvania case by a provision in the instrument creating a special testamentary power that nothing in the donee's will would be construed as an exercise except a specific direction to that effect. The donee was given the income from the appointive property for life. The donee was also a life beneficiary of an entirely different trust without any power to appoint the corpus. The donee purported to make an appointment to a proper object exactly in conformity with the power except that in doing so he referred to the corpus over which he had no power. It was held that there was no specific reference to the power and therefore no exercise.⁴² In *Ruby v. Bishop*⁴³ it was quite properly held that the "power plus interest"⁴⁴ doctrine does not prevent the exercise of a power by a deed purporting to convey a fee simple but making no reference to the power where the grantor has an estate for life with a power to dispose of the fee. Where the donee of a special power to appoint declared in the preamble of his will an intention to dispose of both owned and appointive property his residuary clause was construed in Massachusetts to be an exercise of the power even though the will contained an express appointment of a life estate to the residuary legatee.⁴⁵ The case is of interest in that it contains dicta to the effect that even in the absence of a blending provision the residuary clause alone would be sufficient to constitute an exercise of a special as well as a general power.⁴⁶

Where a widow who had been given a life estate with a special testamentary power of appointment renounced, it was held that the renunciation did not constitute a renunciation or release of the power.⁴⁷ Basing its decision upon a Wisconsin statute which seems to make every special power a power in trust⁴⁸ the court further declared that even if there had been an express attempt to release the

⁴¹ *Carlisle v. Delaware Trust Co.*, 99 A.2d 764 (Del. 1953).

⁴² *In re Windolph's Estate*, 374 Pa. 81, 97 A.2d 67 (1953).

⁴³ 207 F.2d 84 (10th Cir. 1953).

⁴⁴ 5 American Law of Property § 23.39.

⁴⁵ *Frye v. Loring*, 113 N.E.2d 595 (Mass. 1953).

⁴⁶ *Id.* at 598. Similar dicta can be found in earlier Massachusetts cases and can most likely be accepted as law in that state although it appears that no direct ruling has yet been made. See *Stone v. Forbes*, 189 Mass. 163, 169, 75 N.E. 141, 143 (1905).

⁴⁷ *In re Uihlein's Will*, 264 Wis. 362, 59 N.W.2d 641 (1953).

⁴⁸ Wis. Stat. § 232.22 (1949).

power the release would have been impossible.⁴⁰ Other cases dealing with release of powers have included an inter vivos release of testamentary power⁴¹ and a conversion of a general power into a special power by means of a partial release.⁴²

Periodical material on this topic is still concerned principally with treatments of the Powers of Appointment Act of 1951.⁴³ The *Law Quarterly Review* has sounded a warning against the dangers involved in the granting of extensive discretionary powers of disposition to executors,⁴⁴ and it has been held in Maine that if an executor is given an absolute power of disposition over any of the testator's property he is an interested, and therefore incompetent, attester.⁴⁵

*Power to Consume and Gift Over of What Remains.*⁴⁶—Although the validity of a gift over after a life estate with a complete power of disposition is clearly established,⁴⁷ the trend toward recognition of a gift over after a fee simple with similar power in the first taker is moving rather slowly. It would appear that a gift over upon failure of the first taker to dispose of the fee within his lifetime should be no more doubtful than a gift over upon failure of the first taker to have issue,⁴⁸ but the courts appear slow to accept this position. Kentucky departed from the majority rule in 1948,⁴⁹ but that state's refusal to give retroactive effect to "judicial legislation" necessitates the application of the former rule to instruments which took effect prior to the 1948 decision.⁵⁰ Although New Jersey abandoned the majority posi-

⁴⁰ In re Uihlein's Will, 59 N.W.2d 641, 651 (Wis. 1953). Under the Wisconsin statutes it would be difficult to arrive at a different result. This is particularly true in view of the further statutory provision that powers in trust are imperative. Wis. Stat. § 232.23 (1951). However, the case serves to emphasize the lack of realism in classifying powers as being in trust merely because the possible appointees are restricted to a particular class or group of persons. 5 American Law of Property §§ 23.12, 23.27.

⁴¹ Vancannon v. Hudson Belk Co., 236 N.C. 705, 73 S.E.2d 875 (1953).

⁴² Central Hanover Bank & Trust Co. v. Hutchinson, 22 N.J. Super. 78, 91 A.2d 654 (Ch. Div. 1952).

⁴³ Lauritzen, Drafting Powers of Appointment Under the 1951 Act, 47 N.U.L. Rev. 314 (1952); Comment, 51 Mich. L. Rev. 85 (1952).

⁴⁴ Gordon, Delegation of Will-Making Power, 69 L.Q. Rev. 334 (1953).

⁴⁵ In re Kelley's Estate, 92 A.2d 724 (Me. 1952).

⁴⁶ For a brief discussion of the New York law on this topic see Note, 28 N.Y.U.L. Rev. 1162 (1953).

⁴⁷ Moore v. Morris, 258 S.W.2d 908 (Ky. 1953) (recognizing a complete and uncontrolled power of inter vivos disposition without any power to dispose by will); Burlington County Nat. Bank v. Braddock, 24 N.J. Super. 462, 94 A.2d 868 (Ch. Div. 1953).

⁴⁸ An executory interest in this latter form is apparently accepted without any difficulty. Woodard v. Clark, 236 N.C. 190, 72 S.E.2d 433 (1952).

⁴⁹ Hanks v. McDanell, 307 Ky. 243, 210 S.W.2d 784 (1948).

⁵⁰ Brammer v. Wallace, 198 F.2d 742 (6th Cir. 1952).

tion by legislative enactment in 1951,⁶⁰ the old rule has been stated by way of judicial dicta within the year without any reference to the statute.⁶¹ Indications of discontent with the majority rule may be found elsewhere and it is believed that the trend toward giving effect to the expressed testamentary intent on this point may be expected to continue.⁶²

Language creating a power to consume or dispose and defining the extent of such power is not always easy to interpret or construe. Property devised to a husband "to be used and enjoyed by him with the right to sell or dispose . . . as he may desire during his lifetime" with a gift over of what remained at his death, was conveyed by the devisee by warranty deed. It was held that although he had a power to dispose for his own use only, the warranty deed created a presumption of a conveyance for his use and shifted the burden of affirmatively showing otherwise to the beneficiaries of the gift over.⁶³ A power to dispose for the donee's "benefit," "comfort" or "support" is broader than a power to dispose for "maintenance," but even here good faith must be exercised, and the mental comfort or satisfaction found in giving the property away is not a sufficient basis for exercising the power. Such a disposition, even if made for a nominal consideration, will be set aside in favor of the remaindermen.⁶⁴ Where the corpus consisted of a promissory note and the first taker was given power "to receive all . . . payments . . . during her lifetime," with a gift over of the remainder "if any," the rights of the remaindermen were defeated completely by the premature payment of the note even though the note contained no provision for payment prior to due date.⁶⁵

Rule against Perpetuities.—The so-called wait-and-see doctrine which has been so vigorously advocated by some commentators in recent years⁶⁶ has received strong judicial support in New Hampshire.⁶⁷ The court found that the testatrix had provided for two alternative contingencies one of which was valid and the other void. The valid one occurred. Although that should have been ample

⁶⁰ N.J. Stat. Ann. §§ 3:2-19.2, 3:2-19.3 (Supp. 1951).

⁶¹ Burlington County Nat. Bank v. Braddock, 24 N.J. Super. 462, 468, 94 A.2d 868, 871 (Ch. Div. 1953).

⁶² Hicks v. Fairbanks' Heirs, 256 P.2d 169, 178 (Okla. 1953) (dissenting opinion). A similar judicial dissent in New Jersey immediately preceded corrective legislation in that state. Fox v. Snow, 6 N.J. 12, 14, 76 A.2d 877, 878 (1950) (dissenting opinion).

⁶³ Ruby v. Bishop, 207 F.2d 84 (10th Cir. 1953).

⁶⁴ King v. Hawley, 113 Cal. App.2d 534, 248 P.2d 491 (1952).

⁶⁵ Gardner v. Snow, 259 P.2d 95 (Cal. App. 1953).

⁶⁶ Leach, Perpetuities in Perspective: Ending the Rule's Reign of Terror, 65 Harv. L. Rev. 721, 728-30 (1952).

⁶⁷ Merchants Nat. Bank v. Curtis, 98 N.H. 225, 97 A.2d 207 (1953).

ground for the decision⁶⁸ the court did not stop there. It went on to say that even if there had been no such alternative contingencies there would have been no hesitancy in waiting at least until the termination of the life estate and considering the events as they then existed. The doctrine announced is unsound in that it would produce vast uncertainty and would necessarily rest upon the false notion that there is no public policy against tying up property for periods less than that of the Rule against Perpetuities.⁶⁹

Alternative contingencies were also involved in *Layton v. Black*⁷⁰ where a testator left property in trust to pay income to his daughter for life. There was further provision that if the daughter died leaving issue, income was to be paid to such issue until the youngest reached twenty-five years of age at which time the principal was to be paid to the issue, but if the daughter died without issue, gift over upon her death. The daughter brought action to have the trust declared void in its entirety on the ground that the Rule against Perpetuities was violated. It was quite properly held that the action was premature. Unfortunately the court proceeded further to declare that the validity of the provisions following the life of the daughter would depend upon whether or not she had issue. The position was taken that in the absence of issue the gift over would be valid, but that if there were issue the gift to them would be void since it might not vest within the period of the rule. This part of the opinion appears at least questionable since there was nothing to indicate why the postponement of distribution to age twenty-five should be construed to postpone vesting until that age.⁷¹

Without the aid of a statute Delaware has held that a trust to provide for the perpetual upkeep of a private cemetery plot is not affected by the Rule against Perpetuities.⁷² Although this position is in conflict with the weight of authority,⁷³ it was taken earlier, apparently without argument, in Delaware⁷⁴ and now seems to be established law in that state.

The common-law presumption in favor of indefinite failure of

⁶⁸ *Layton v. Black*, 99 A.2d 244 (Del. 1953); 2 Simes, *Future Interests* § 521.

⁶⁹ For an excellent analysis of the far-reaching implications of the wait-and-see doctrine and a treatment of the public policy involved see Simes, *Is the Rule against Perpetuities Doomed?*, 52 Mich. L. Rev. 179 (1953).

⁷⁰ 99 A.2d 244 (Del. 1953).

⁷¹ Cf. *Trippe v. National Newark & Essex Banking Co.*, 98 N.J. Eq. 462, 131 Atl. 162 (Ch. 1925).

⁷² *Delaware Trust Co. v. Delaware Trust Co.*, 95 A.2d 569 (Del. Ch. 1953), *Security Trust Co. v. Willett*, 97 A.2d 112 (Del. Ch. 1953).

⁷³ 2A Bogert, *Trusts and Trustees* § 377 (1953).

⁷⁴ *Trustees of Methodist Episcopal Church v. Williams*, 29 Del. (6 Boyce) 62, 96 Atl. 795 (1914).

issue still prevails in some jurisdictions and can create perpetuities complications.⁷⁵ Gifts made contingent upon the end of World War II are still coming before the courts and are still frustrating testators' intentions.⁷⁶ Without altering the rule that the law will never presume impossibility of issue for the purpose of determining the validity of property interests Connecticut has recognized the right of the testator to make such a presumption.⁷⁷ There have also been decisions that the Rule against Perpetuities does not affect ordinary land contracts⁷⁸ or restrict the duration of trusts whether they be private⁷⁹ or charitable⁸⁰ in nature.

The most interesting legislative development of the year took place in North Dakota. The statutory period permitted in that state has been lives in being or, in the alternative, a period in gross of twenty-five years.⁸¹ To this there has been an exception in the form of a statutory restricted minority.⁸² The new enactment abolishes the twenty-five-year period in gross and adopts the common-law period of lives in being and twenty-one years.⁸³ The peculiar feature of the new statute is that the statutory restricted minority is specifically retained. The first case applying a statutory restricted minority exception to the common-law Rule against Perpetuities should prove interesting to say the least.

Retirement trusts and certain related trusts have been exempted from the operation of the rules against perpetuities and accumulations in Georgia⁸⁴ and New York⁸⁵ and from the rule against accumulations in Minnesota.⁸⁶ Application of the New York and Minnesota statutes is made to depend upon whether or not the trusts concerned are exempt from federal income taxation by the United States Internal Revenue Code, but the Georgia provision makes no reference to the federal statutes. Illinois has revised its permitted period for

⁷⁵ *Adams v. Vidal*, 60 So.2d 545 (Fla. 1952) (sufficient indication that definite failure of issue was intended was found).

⁷⁶ *Brownell v. Edmunds*, 110 F. Supp. 828 (W.D. Va. 1953).

⁷⁷ *Bankers Trust Co. v. Pearson*, 140 Conn. 332, 99 A.2d 224 (1953).

⁷⁸ *Hill v. State Box Co.*, 114 Cal. App.2d 44, 249 P.2d 903 (1952). Since the contract creates vested equitable interests there should be no basis for the application of the Rule against Perpetuities. *Berg, Long-Term Options and the Rule against Perpetuities*, 37 Calif. L. Rev. 235, 243-44 (1949).

⁷⁹ *Goetz v. Goetz*, 174 Kan. 30, 254 P.2d 822 (1953); *Bardfield v. Bardfield*, 23 N.J. Super. 248, 92 A.2d 854 (Ch. Div. 1952).

⁸⁰ *In re Small's Estate*, 58 N.W.2d 477 (Iowa 1953).

⁸¹ N.D. Rev. Code § 47-0227 (1943).

⁸² N.D. Rev. Code § 47-0413 (1943).

⁸³ N.D. Laws 1953, c. 274, amending N.D. Rev. Code § 47-0227 (1943).

⁸⁴ Ga. Laws 1953, No. 81, amending Ga. Code Ann. § 85-707 (1935).

⁸⁵ N.Y. Pers. Prop. Law § 13-d (Supp. 1953).

⁸⁶ Minn. Stat. Ann. § 500.17(6) (West Supp. 1953).

the accumulation of income so as to make it conform to the period of the common-law Rule against Perpetuities.⁸⁷

Worthwhile periodical contributions not previously referred to include a carefully prepared comment on the types of statutory rules prevailing in the United States⁸⁸ and a critical and analytical study of the 1951 California enactment.⁸⁹

*Direct Restraints on Alienation.*⁹⁰—The doctrine of "reasonable restraints" which has prevailed in an extremely small minority of American jurisdictions⁹¹ appears to be losing further ground. Although it has been applied in Kentucky⁹² within the year it has been repudiated in Nebraska.⁹³

A covenant that the grantee will not convey to anyone except the grantors or their heirs or assigns restricts the number of potential buyers available to the grantee and is void however short the period of time involved.⁹⁴ It is also clear that a direct restraint is not made less objectionable by a provision that it may be waived by the testator's executors.⁹⁵

⁸⁷ Ill. Ann. Stat. c. 30, § 153 (Smith-Hurd Supp. 1953).

⁸⁸ Munson, Recent Changes in Statutory Rules against Perpetuities, 38 Cornell L.Q. 543 (1953).

⁸⁹ Fraser & Sammis, The California Rules against Restraints on Alienation, Suspension of the Absolute Power of Alienation, and Perpetuities, 4 Hastings L.J. 101 (1953).

⁹⁰ For a brief treatment of both direct and indirect restraints on alienation in Wisconsin see McClelland, Restraints on Alienation of Property Not Held in Trust, 36 Marq. L. Rev. 372 (1953).

⁹¹ 6 American Law of Property § 26.22; 2 Simes, Future Interests § 458.

⁹² Bogle v. Britton, 258 S.W.2d 898 (S.W. advance sheet No. 4, Aug. 4, 1953) (opinion subsequently withdrawn by order of the Kentucky Court of Appeals).

⁹³ Andrews v. Hall, 156 Neb. 817, 58 N.W.2d 201 (1953), overruling Peters v. Northwestern Mut. Life Ins. Co., 119 Neb. 161, 227 N.W. 917 (1929).

⁹⁴ Braun v. Klug, 335 Mich. 691, 57 N.W.2d 299 (1953).

⁹⁵ Pritchett v. Badgett, 257 S.W.2d 776 (Tex. Civ. App. 1953).

TRUSTS AND ADMINISTRATION

RUSSELL D. NILES

MANY of the recent developments in the law of trusts are reflected in the proposed changes in the *Restatement of Trusts* submitted to the American Law Institute in May 1953.¹ Some of the important changes relate to "pour over" problems,² illusory trusts,³ tentative trusts,⁴ application to trusts of rules against perpetuities,⁵ protective trusts⁶ and jurisdiction of the court over the administration of trusts.⁷

The current periodical literature suggests the necessity for a critical re-examination of two types of trusts which have had great development in America: the spendthrift trust⁸ and the charitable trust.⁹ In the growing literature on comparative law, the trust is a favorite topic for discussion.¹⁰

There were legislative enactments relating to trusts in about half of the states, and there were cases in abundance. It is interesting to note, however, that most of the statutory changes related to the administration of trusts—attempts to make administration more economical or less hazardous—while relatively few cases involved problems of administration. The legislative changes in recent years have minimized the litigation involving income-principal adjustments. The relaxation of statutory rules relating to investment and ten years of rising security prices have also tended to reduce litigation. The more important cases related to illusory and tentative trusts, termination, invasion of corpus, breach of trust especially in divided-loyalty situations, spendthrift trusts and charitable trusts. The statutes and the decisions are discussed in the traditional order.

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¹ Restatement of the Law Continued: Trusts, Tentative Draft No. 1 (May 1, 1953).

² Id. § 54.

³ Id. § 57.

⁴ Id. § 58.

⁵ Id. § 62.

⁶ Id. § 156.

⁷ Id. § 199, comment; § 220, comment c.

⁸ See p. 665 *infra*.

⁹ See p. 667 *infra*.

¹⁰ Bolgar, Why No Trusts in the Civil Law?, 2 Am. J. Comp. L. 204 (1953); Garrigues, Law of Trusts, 2 Am. J. Comp. L. 25 (1953); Nabors, Entrepreneurial Trusts, 27 Tulane L. Rev. 263 (1953); Oppenheim, Limitations and Uses of Louisiana Trusts, 27 Tulane L. Rev. 41 (1952); Pascal, Some ABC's About Trusts and Us, 13 La. L. Rev. 555 (1953).

I

CREATION OF TRUSTS

The long-continued controversy about when a revocable inter vivos trust is in fact testamentary would probably have been settled by now if it had not been for the statutes giving surviving spouses elective rights in the decedent's estate in lieu of dower and curtesy. Where a husband, for example, transfers legal title to all or most of his estate to a trustee but reserves not only the income for his life but also powers to revoke or modify and also some control over investments, and dies leaving a widow surviving him, there are at least three possible alternative decisions: the trust might be held to be completely valid, with the trust assets beyond the widow's reach; the trust might be completely invalid as an inter vivos transaction, with the trust fund constituting part of the husband's estate; or the trust might be valid as to all except the surviving spouse, and as to her be avoidable pro tanto to the extent necessary to make available her full elective share. The third view best carries out the policy of the statutes giving the surviving spouse a right of election and may well be the ultimate statutory solution (as indeed it will be prospectively in Pennsylvania¹¹), but there is no satisfactory way to work out this solution under traditional case law.¹² The dictum in *Newman v. Dore*¹³ that such a trust might be valid as to others but illusory as to the surviving spouse has caused a great deal of uncertainty. The current cases, while otherwise hard to reconcile, do come to this conclusion: a trust with substantial control retained is either all good or all bad; if illusory it is void as to all; if valid it is effective as to all.¹⁴

Two important current cases are quite unsettling. As stated in the note to the proposed change of Section 57 of the *Restatement of Trusts*: "There has been a trend in favor of upholding revocable trusts even though the settlor has reserved power of control over the trustee."¹⁵ The case cited in support was *National Shawmut Bank v. Joy*¹⁶ and many others could have been cited,¹⁷ including cases from New York¹⁸

¹¹ Pa. Stat. Ann. tit. 20, § 301.11 (1950).

¹² There is of course some authority for this result under the doctrine of fraud on the surviving spouse's elective rights. See Niles, *Model Probate Code and Monographs on Probate Law: A Review*, 45 Mich. L. Rev. 321, 330 (1947).

¹³ 275 N.Y. 371, 9 N.E.2d 966 (1937).

¹⁴ *Matter of Halpern*, 303 N.Y. 33, 100 N.E.2d 120 (1951); *Matter of Ford's Estate*, 304 N.Y. 598, 107 N.E.2d 87 (1952); *MacGregor v. Fox*, 280 App. Div. 435, 114 N.Y.S.2d 286 (1st Dep't 1952), *aff'd*, 305 N.Y. 576, 111 N.E.2d 445 (1953); *In re Pengelly's Estate*, 374 Pa. 358, 97 A.2d 844 (1953).

¹⁵ *Restatement of the Law Continued: Trusts, Tentative Draft No. 1* at 76 (May 1, 1953.)

¹⁶ 315 Mass. 457, 53 N.E.2d 113 (1944), 1944 Annual Surv. Am. L. 874.

¹⁷ See 1952 Annual Surv. Am. L. 570, 28 N.Y.U.L. Rev. 633 (1953).

¹⁸ *In re Ford's Estate*, 304 N.Y. 598, 107 N.E.2d 87 (1952); *Matter of Halpern*, 303 N.Y. 33, 100 N.E.2d 120 (1951).

and Pennsylvania.¹⁹ The proposed Section 57 would sustain as valid inter vivos trusts those in which the settlor reserved a beneficial life estate, powers to revoke or modify, and a power to control the trustee as to the administration of the trust.²⁰ The proposed text is not supported by the current decisions in New York and Pennsylvania.

The New York case is only a memorandum decision of the Court of Appeals,²¹ affirming a per curiam decision of the Appellate Division,²² but the case is significant because it comes so soon after *In re Ford's Estate*.²³ The settlor reserved the income from the trust property (a parcel of real estate) and the power to alter, amend or annul the trust agreement. The trustee was prohibited from selling, mortgaging or leasing the property without the consent of the settlor. The trust was held to be illusory and the trust instrument was "void in its entirety."²⁴ The court was clearly influenced by the fact that the "trust" was established in an attempt to bar the settlor's husband's elective rights in her estate.

The Pennsylvania decision is even more important because it is supported by an opinion concurred in by the full court. Again a disappointed surviving spouse was challenging the validity of an inter vivos trust created by the deceased spouse. The settlor, estranged from his wife and living with a housekeeper, executed a formal trust instrument naming his investment adviser trustee, and providing that the income be paid to the settlor for life, then to his housekeeper for her life, with remainder to others. The settlor also reserved the right to withdraw principal for his comfortable maintenance and support as he deemed it necessary, and the right to approve investments made by the trustee under his granted powers. The court held the trustee was merely an agent²⁵ and directed him to transfer all of the assets

¹⁹ *In re Shapley's Deed of Trust*, 353 Pa. 499, 46 A.2d 227, 164 A.L.R. 877 (1946).

²⁰ The text of proposed § 57 is as follows:

"(1) Where by the terms of the trust an interest passes to the beneficiary during the life of the settlor, the trust is not testamentary merely because the settlor reserves a beneficial life estate or because he reserves in addition a power to revoke the trust in whole or in part and a power to modify the trust, and a power to control the trustee as to the administration of the trust, and the disposition will not be invalid for failure to comply with the requirements of the Statute of Wills unless the terms are so informally stated and the power of control reserved is so great that it would violate the policy of the Statute of Wills to enforce it.

"(2) Except as stated in § 58, where the settlor declares himself trustee and reserves not only a beneficial life estate and a power to revoke and modify the trust but also power to deal with the property as he likes as long as he lives, the intended trust is testamentary."

²¹ *In re MacGregor's Will*, 305 N.Y. 576, 111 N.E.2d 445 (1953).

²² 280 App. Div. 435, 114 N.Y.S.2d 286 (1st Dep't 1952).

²³ 304 N.Y. 598, 107 N.E.2d 87 (1952).

²⁴ 280 App. Div. 435, 437, 114 N.Y.S.2d 286, 288 (1st Dep't 1952).

²⁵ Citing Restatement, Trusts § 57(2) (1935).

held by him to the estate of the settlor.²⁶ On the question of protecting a surviving spouse, the case will be of diminishing importance in Pennsylvania because the Estate Act of 1947 will control trusts created after that date,²⁷ but the regressive effect on the development of trust law may last longer.²⁸

There has been a new flurry of interest in the Totten trust since *Matter of Halpern*²⁹ with a change proposed in the relevant comment under Section 58 of the *Restatement of Trusts* to conform with the decision.³⁰ The most interesting current cases do not involve the question of when is a Totten trust illusory or testamentary but rather when is it irrevocable? The Supreme Court of Pennsylvania, having only recently adopted the tentative trust doctrine,³¹ has now taken the position that since these savings bank trusts are presumably revocable (contrary to other inter vivos trusts) they cannot be held to be irrevocable without very clear proof of such an intention. The depositor wrote the named beneficiary that she had made a deposit in a certain savings bank "as a graduating gift . . . in trust for you and your heirs," but she also indicated that she might need the money and apparently thought that she would have a right to use it. She withdrew the money a week before she died. By a divided vote the court held that an irrevocable trust had never been created.³²

There has been a good deal written lately about the teasing problems involved where a testator attempts to add by will to the fund of an inter vivos trust, especially where the trust has been amended after the execution of the will.³³ If the problem had not become involved in the casuistry of incorporation by reference it might have caused little trouble.³⁴ The most straightforward and definitive at-

²⁶ *In re Pengelly's Estate*, 374 Pa. 358, 97 A.2d 844 (1953).

²⁷ Pa. Stat. Ann. tit. 20, § 301.11 (1950).

²⁸ For citation of cases in support of the proposed change of § 57 see 38 Va. L. Rev. 956 (1952), commenting on *Stouse v. First Nat. Bank*, 245 S.W.2d 914 (Ky. 1951). See also *Hines v. Louisville Trust Co.*, 254 S.W.2d 73 (Ky. 1952). In some cases the decedent may well have intended only a testamentary disposition. *Johnson v. Weldy*, 54 N.W.2d 829 (N.D. 1952).

²⁹ 303 N.Y. 33, 100 N.E.2d 120 (1951), followed in *In re Friesing's Estate*, 123 N.Y.S.2d 207 (Surr. Ct. 1953); *In re Leiman's Estate*, 116 N.Y.S.2d 658 (Surr. Ct. 1952), aff'd, 281 App. Div. 764, 118 N.Y.S.2d 750 (2d Dep't 1953).

³⁰ *Restatement of the Law Continued: Trusts*, Tentative Draft No. 1 at 78-79 (May 1, 1953).

³¹ *In re Scanlon's Estate*, 313 Pa. 424, 169 Atl. 106 (1933).

³² *In re Ingels' Estate*, 372 Pa. 171, 92 A.2d 881 (1952), 26 Temple L.Q. 468 (1953). See also *In re Rodgers' Estate*, 374 Pa. 246, 97 A.2d 789 (1953).

³³ Note, 39 Va. L. Rev. 817 (1953); 1952 Annual Surv. Am. L. 572-73, 28 N.Y.U.L. Rev. 635-36 (1953), citing articles. See also 1953 Survey of New York Law, 28 N.Y.U.L. Rev. 1514-5, commenting on New York cases, including *Matter of Hanover Bank (Zayas)*, 129 N.Y.L.J. 1298, col. 8 (Sup. Ct. April 20, 1953).

³⁴ See, e.g., N.Y. Pers. Prop. Law § 12, as amended, N.Y. Laws 1927, c. 239, sav-

tempt to rationalize this branch of the law is to be found in the 1953 proposed changes to Section 54 of the *Restatement of Trusts*.³⁵ While the proposed text may be a statement of the law as it ought to be rather than a restatement of the law as it is, it should at least clarify the thinking of many lawyers and if adopted should help mold the law along rational lines. The chief contribution of the proposed change is to make clear how much more useful and defensible the doctrine of independent legal significance is than the limited and often unnecessary doctrine of incorporation by reference.

Other cases worthy of mention involved the questions of whether a debt or a trust was created;³⁶ whether taking out an educational endowment policy created a trust for the child to be benefited;³⁷ whether a trust was active or passive;³⁸ whether or not a trust was contrary to public policy;³⁹ and whether or not secret trusts⁴⁰ or honorary trusts were valid.⁴¹

II

TERMINATION AND MODIFICATION

Where a power to revoke a trust is expressly retained, the only problem usually is whether or not the settlor has exercised the power within its precise terms.⁴² In the case of a Totten trust, where the power of revocation is retained by implication, the revocation has been sustained where made by oral declaration to the depositor's attorney,⁴³

ing gifts to charitable corporations even though printed resolutions or declarations of trust may be incorporated in the will by reference.

³⁵ Restatement of the Law Continued: Trusts, Tentative Draft No. 1 at 67-74 (May 1, 1953).

³⁶ *Norman v. Judy*, 251 S.W.2d 467 (Ky. 1952) (corporation employee obtained money from third party to buy stock under employee purchase plan, promised to pay annual dividend of 20 per cent; held debt, not trust, and at usurious rate). See also *Castoldi, Trust or Debt?*, 13 Mont. L. Rev. 92 (1952), and proposed changes in Restatement of the Law Continued: Trusts, Tentative Draft No. 1 at 61 et seq. (May 1, 1953).

³⁷ *Rossclott v. Rossclott*, 93 Ohio App. 425, 113 N.E.2d 639 (1952). See also *In re Evans' Estate*, 372 Pa. 284, 93 A.2d 683 (1953) (expression of motive or reason for gift does not impose trust duties on donee).

³⁸ *In re Bergland's Estate*, 372 Pa. 1, 92 A.2d 207 (1952) (trustee's only duty was to determine whether claimant was testator's sister in Sweden and to transmit property as he thought best; active trust).

³⁹ *Perkins v. Hilton*, 329 Mass. 291, 107 N.E.2d 822 (1952), 33 B.U.L. Rev. 130 (1953) (son took title to get benefits under G.I. Bill, mother to pay all expenses; oral trust for mother void as fraud on statute).

⁴⁰ *Gibson v. Security Trust Co.*, 201 F.2d 573 (4th Cir. 1953).

⁴¹ *In re Astor's Settlement Trusts*, [1952] Ch. 534, 68 L.Q. Rev. 449 (1952), 51 Mich. L. Rev. 1104 (1953), in which noncharitable inter vivos trusts not for the benefit of individuals were held to be void. Cf. Restatement, Trusts §§ 123, 124, 417, 419 (1935).

⁴² *Schuster v. Schuster*, 75 Ariz. 20, 251 P.2d 631 (1952).

⁴³ *In re Rodgers' Estate*, 374 Pa. 246, 97 A.2d 789 (1953).

where the depositor has withdrawn the fund from the bank⁴⁴ or where the depositor has made an inconsistent provision in his will.⁴⁵ If the rule of *Matter of Halpern*—that a disappointed surviving spouse cannot reach the fund of a Totten trust created by the deceased spouse—should prevail, there might be some doubt about the hitherto established rule that a Totten trust can be revoked by a will.⁴⁶ As a matter of strict logic, how can a will, taking effect after death, affect an inter vivos trust once it is held not to be testamentary or illusory and to be free of the elective rights applicable to property which devolves on death?⁴⁷ The answer may be that once one accepts an anomaly he must go on making logical concessions.

Eventually New York will have a very liberal rule permitting the termination of inter vivos trusts because of the terms of the recent statute⁴⁸ which applies to trusts created after September 1, 1951, but no relief is in prospect with respect to testamentary trusts⁴⁹ or with respect to inter vivos trusts created before the operative date of the statute.⁵⁰

A lower court Pennsylvania decision is significant: the beneficiary of a testamentary spendthrift trust was permitted to terminate the trust when he had assignments from all contingent remaindermen except his issue upon his proof that he had had no issue and at the age of sixty-four was incapable of procreation.⁵¹

This year as in prior years there have been attempts to have a court of equity direct the trustee to deviate from the strict terms of a trust in order the better to carry out the underlying intention of the creator of the trust. In the absence of statute the relief available

⁴⁴ *In re Ingels' Estate*, 372 Pa. 171, 92 A.2d 881 (1952), 26 Temple L.Q. 468 (1953), 14 U. of Pitt. L. Rev. 627 (1953).

⁴⁵ See *In re Koster's Will*, 119 N.Y.S.2d 2 (Surr. Ct. 1952), and cases cited therein.

⁴⁶ *Walsh v. Emigrant Industrial Savings Bank*, 106 Misc. 628, 176 N.Y. Supp. 418 (Sup. Ct. 1919), aff'd, 192 App. Div. 908, 182 N.Y. Supp. 956 (1st Dep't 1920), aff'd, 233 N.Y. 512, 135 N.E. 897 (1922); *In re Rodgers' Estate*, 374 Pa. 246, 97 A.2d 789 (1953).

⁴⁷ See N.J. Stat. Ann. § 17:9A-216 (Supp. 1953).

⁴⁸ N.Y. Laws 1951, c. 180, amending Pers. Prop. Law § 23 and Real Prop. Law § 118. See Scott, *Revoking a Trust: Recent Legislative Simplification*, 65 Harv. L. Rev. 617 (1952).

⁴⁹ *In re Knauss' Estate*, 204 Misc. 207, 121 N.Y.S.2d 5 (Surr. Ct. 1953).

⁵⁰ Compare, e.g., *Stevens v. New York Trust Co.*, N.Y.L.J., Jan. 26, 1954, p. 1, col. 1 (App. Div., 1st Dep't), and *Hope v. United States Trust Co.*, 281 App. Div. 52, 117 N.Y.S.2d 540 (1st Dep't, 1952), holding an ultimate gift to the grantor's distributees or next of kin to be a remainder, with *Kolb v. Empire Trust Co.*, 280 App. Div. 370, 113 N.Y.S.2d 550 (1st Dep't 1952), holding that where the fund would ultimately be disposed of under the laws of descent and distribution of the State of New York, a reversion was retained. See also *In re Coyle's Trust*, 305 N.Y. 809, 113 N.E.2d 556 (1953).

⁵¹ *Kelby Estate*, 80 Pa. D. & C. 1 (County Ct. 1952), 14 U. of Pitt. L. Rev. 452 (1953).

is quite limited, usually to emergency situations where the relief granted will be for the benefit of all beneficiaries.⁵²

III

INVASION OF CORPUS

As reported by an officer of a trust company in a recent article:⁵³ "In these days we find it unusual to accept a trust which does not include powers of some kind to invade principal for the income beneficiary." While these clauses have created many problems, as considered in this article in previous years,⁵⁴ the significant current cases involve the question of whether or not the other resources of the beneficiary are to be considered by the trustee in exercising the power to use corpus.

A case recently decided by a divided vote of the Supreme Court of California is in point.⁵⁵ The testator gave half of his estate to his son outright and the other half to his son and a trust company in trust to pay the income to the testator's daughter for life, and to pay the principal at her death, unless all or part was paid to her before then, one-half to the son and one-half to the son's children. Since the daughter was known by the testator to have an incurable and progressive disease he provided: "If at any time the income from the corpus . . . is insufficient to meet the needs of my daughter . . . in the sole discretion of the trustees herein, the trustees may pay to my daughter . . . such amounts from the principal . . . to meet her needs, care, and

⁵² *Segelken v. Segelken*, 26 N.J. Super. 178, 97 A.2d 501 (App. Div. 1953), reversing trial court which had directed use of principal for support of the settlor's son since such invasion (although probably agreeable to what the settlor would have wished) would be to the prejudice of the remaindermen. Cf. *Bolles v. Boatmen's Nat. Bank*, 363 Mo. 949, 255 S.W.2d 725 (1953), in which the testator gave the corpus of his estate to the state subject to certain annuities out of income for twenty years. For eight years the annuities could not be paid because all income (although more than enough for the annuities) had to be used for payment of taxes and debts since the real property could not be sold immediately. The court held that the annuities should nevertheless be paid, without interest, before the corpus was paid over, although this involved a modification of the terms of the will. See a restatement of the law relating to deviation, with a collection of the recent cases in *Wentworth, Deviations from Terms of Will*, 92 *Trusts & Estates* 720 (1953), based on the report of a committee of the Section of Real Property, Probate and Trust Law, American Bar Association. For a discussion of interesting English cases (*Re Downshire Settled Estates*, *Re Chapman's Settled Estates*, and *Re Blackwell's Settlement Trusts*, [1953] Ch. 218), see 69 *L.Q. Rev.* 150 (1953), 16 *Mod. L. Rev.* 381 (1953).

⁵³ *McLucas, The Discretionary Trust: Guides for Exercise of Powers to Distribute Income and Principal*, 92 *Trusts & Estates* 824 (1953).

⁵⁴ See proposed Comment 1, § 128, *Restatement of the Law Continued: Trusts*, Tentative Draft No. 1 (May 1, 1953); *Levy, The Trustee's Power to Invade*, 128 *N.Y.L.J.* 548, col. 1 (Sept. 22, 1952); 1953 *Survey of New York Law*, 28 *N.Y.U.L. Rev.* 1486; *Note*, 57 *Dick. L. Rev.* 149 (1953).

⁵⁵ *In re Ferrall's Estate*, 258 P.2d 1009 (Cal. 1953).

comforts" All of the principal was payable to her if her husband should divorce her.

The trust fund amounted to \$27,000 and yielded an income of \$82.50 a month. The daughter was in a hospital and required \$475 a month for her care. After the daughter's personal estate was used up, her husband as her guardian demanded that the trustees pay the deficiency in the cost of her care and maintenance out of the trust fund. The trustees countered by demanding to know whether or not the husband was able to pay for her care. The husband conceded that he was able to pay his wife's expenses but claimed that it was an abuse of the discretion given the trustees to refuse to invade principal to pay the amount needed by the testator's daughter for her "needs, care and comforts."

The trial court and the intermediate appellate court⁵⁶ decided that the trustees had abused their discretion in not using principal to pay for the daughter's care. The supreme court reversed by a vote of three to two on the theory that since the beneficiary's husband was able to pay for her care, the beneficiary was not actually in need. The dissenting justices thought that the testator had intended that his daughter should have her support out of her half of her father's estate, whether or not she or her husband had other earnings or resources.⁵⁷

In a New Jersey case, under the somewhat similar clause of a deceased sister's will, the ill and elderly surviving sister was required to use the income from her own resources but not to exhaust her principal before the power to invade was properly exercisable.⁵⁸ In a Delaware case a brother left the residue of his estate in trust for the primary benefit of his sister who was mentally ill and a patient in the state hospital, with a direction to his trustees to pay so much of the income and to expend so much of the principal as should be necessary for her "support, care, treatment and comfort." The remaindermen were nephews. The sister's only assets were a house and some household furnishings. The chancellor instructed the trustee that it should not require the sister to exhaust her resources before invading the corpus of the trust.⁵⁹

⁵⁶ *In re Ferrall's Estate*, 248 P.2d 108 (Cal. App. 1952).

⁵⁷ *In re Ferrall's Estate*, 258 P.2d 1009, 1015 (Cal. 1953).

⁵⁸ *Stetson v. Community Chest of the Oranges*, 24 N.J. Super. 243, 93 A.2d 796 (Ch. Div. 1952).

⁵⁹ *Farmers Bank v. Delaware Trust Co.*, 95 A.2d 45 (Del. Ch. 1953). Accord, *In re Rosenberg's Will*, 121 N.Y.S.2d 874 (Surr. Ct. 1953). But see *In re Gruber's Will*, 122 N.Y.S.2d 654 (Surr. Ct. 1953), in which the trustee was to consider other "funds from which support could properly be received outside my estate" in exercising the power to invade, but nevertheless the state was entitled to reimbursement out of the trust corpus for the cost of her maintenance in a state institution. One

IV

INCOME-PRINCIPAL

The relative quiet on this historic battlefield, while greatly to the benefit of all, still leaves the old campaigner with a nostalgic feeling about the conflicts of the past. Only the mopping-up seems to be left.

The Uniform Principal and Income Act has been adopted in West Virginia⁶⁰ and amended in California.⁶¹ In Tennessee, the Pennsylvania rule relating to stock dividends has been confirmed with a suggestion that if change is to come it must be by legislation,⁶² and accordingly the Uniform Principal and Income Act has been recommended to the General Assembly.⁶³ The Uniform Principal and Income Act, adopted in Alabama in 1939,⁶⁴ has been held inapplicable to a trust under a will probated in 1906.⁶⁵ Florida has adopted a statute relating to income earned during the period of administration which is substantially like the Massachusetts rule.⁶⁶

The most interesting cases involved special clauses in trust instruments designed to control the administration of particular trusts at a time when the law was more fluid.⁶⁷ Especially significant was an Illinois case interpreting a tax clause in a 1916 deed of trust. The settlor had apparently provided that all taxes (under present or future law) with respect to principal should be paid out of income. A capital gain of \$300,000 involved a federal tax liability of \$60,000 which would take all of the distributable income for several years and would, if paid out of income, involve an ultimate tax liability of \$77,000. In a most imaginative example of judicial construction, the supreme court, overruling the intermediate appellate court,⁶⁸ held

Interesting innovation has been suggested to give greater precision to invasion of corpus clauses: to key benefits from the estate to the Bureau of Labor Statistics Consumers' Price Index as are some labor contracts. The advantages and possible disadvantages are discussed in a current article. Blackstone, *The Bureau of Labor Statistics in Trust and Estate Practice*, 14 U. of Pitt. L. Rev. 578 (1953).

⁶⁰ W. Va. Code Ann. §§ 3581(6)-(22) (Supp. 1953).

⁶¹ See Cal. Laws 1953, c. 37.

⁶² *Nashville Trust Co. v. Tyne*, 194 Tenn. 435, 250 S.W.2d 937 (1952).

⁶³ 22 Tenn. L. Rev. 973, 975 esp. n.18 (1953).

⁶⁴ Ala. Code Ann. tit. 58, §§ 75-87 (1940).

⁶⁵ *Toolen v. Amos*, 67 So.2d 8 (Ala. 1953).

⁶⁶ Fla. Laws 1953, c. 28025.

⁶⁷ *In re Matthews' Trust*, 305 N.Y. 605, 111 N.E.2d 731 (1953) ("regular stock dividends paid in lieu of or in conjunction with regular cash dividends shall be deemed to be income"). See 1953 Survey of New York Law, 28 N.Y.U.L. Rev. 1487; *Estate of Schramm*, 115 Cal. App.2d 55, 251 P.2d 418 (1952). Testator directed that all income during period of administration be used to pay taxes and administration expenses, thus overriding usual rule.

⁶⁸ *United States Trust Co. v. Jones*, 346 Ill. App. 365, 105 N.E.2d 122 (1952), 31 Chi-Kent Rev. 194 (1953).

that the clause referred only to taxes on principal (like annual real estate taxes) and not to taxes on the sale of principal.⁶⁹

V

DUTY OF LOYALTY

Many cases during the year involved the duty of a trustee to give undivided loyalty to his trust, but most of the decisions applied familiar principles and are not worthy of note here except that by their very number they indicate the growing public awareness of the selfless standard expected of trustees.

Since self-dealing transactions are almost invariably avoidable,⁷⁰ the only interesting cases are the few exceptional ones. For example, where a widow who was also an executrix and trustee under her husband's will bought the South Carolina plantation which her husband had purchased as a winter home and had done so with the full approval of all living adult beneficiaries (but not, of course, of contingent remaindermen who were infants or as yet unborn), the court of equity, some ten years later, gave a declaratory judgment confirming the transaction and determining that the widow could give a marketable title to a purchaser. All persons interested in the trust were represented in the proceeding and were bound by the judgment. The court confirmed, after a full examination of the transaction, what it would have authorized if a timely application had been made.⁷¹

The most interesting current cases involve a trustee in a position of divided loyalty but in a position contemplated by the creator of the trust. The New Jersey case of *Rosencrans v. Fry*, commented on last year on the basis of the decision of the intermediate appellate court,⁷² has been affirmed by the supreme court.⁷³ The testator named his widow and business associate, Fry, cotrustees and gave Fry an option to buy the testator's controlling stock in a corporation (organized by the testator) at a price below its value, even though the stock would in the meantime constitute the principal asset in the testamentary trust. Since Fry had a dominant position in the corporation, he could probably have enhanced the value of the stock, over which he had an option, by following a policy of paying out less in dividends, for the benefit of the widow, than he might otherwise have done.

⁶⁹ *United States Trust Co. v. Jones*, 414 Ill. 265, 111 N.E.2d 144 (1953).

⁷⁰ *In re Schulz' Estate*, 374 Pa. 459, 98 A.2d 176 (1953); *Waddell v. Waddell*, 335 Mich. 498, 56 N.W.2d 257 (1953); *Johnson v. Sarver*, 350 Ill. App. 565, 113 N.E.2d 578 (1953); *Davis v. Jenkins*, 236 N.C. 283, 72 S.E.2d 673 (1952).

⁷¹ *Honeywell v. Dominick*, 223 S.C. 365, 76 S.E.2d 59 (1953).

⁷² 21 N.J. Super. 289, 91 A.2d 162 (Ch. Div. 1952); 1952 Annual Surv. Am. L. 587, 28 N.Y.U.L. Rev. 650 (1953).

⁷³ 12 N.J. 88, 95 A.2d 905 (1953).

Justice Heher thought that *In re Hubbell's Will*⁷⁴ should be followed and the trustee made accountable for the amount of the increase of corporate surplus which might have been paid out as dividends, but the majority of the court held that the trustee had played his difficult role without unfairness.⁷⁵ The same general problem was involved in several other cases where the testator wanted his trustee to take an active part in a corporation in which his estate had a substantial interest, and while the conduct of the trustee in his dual position has been carefully scrutinized, the trustee has generally not been surcharged where no abuse of his position has been shown.⁷⁶

A trustee must be sensitive to unexpected conflicts of interest. For example, in a current case the question was whether or not a proper objection could be made to the appointment of an attorney as successor trustee on the ground that he had represented the predecessor trustee in the preparation of his final account and therefore might not be as free to examine the transactions of the retiring trustee as he should have been. A majority of the supreme court sustained the appointment, reversing the intermediate appellate court.⁷⁷

The duty of the trustee in dealing with competent beneficiaries is quite different from his duty when dealing with himself. There is no self-dealing when a trustee deals with a beneficiary, but nevertheless a trustee has a strict duty not to take advantage of his position or to fail to disclose any information which he has and which the beneficiary may lack.⁷⁸

VI

TRUSTEES: POWERS

There has been further relaxation during the year in the law in several states in permitting foreign trust companies to act in a fiduciary capacity in competition with local trust companies. Illinois has

⁷⁴ 302 N.Y. 246, 97 N.E.2d 888 (1951).

⁷⁵ 12 N.J. 88, 95 A.2d 905 (1953).

⁷⁶ *In re Barrows' Will*, 204 Misc. 339, 123 N.Y.S.2d 501 (Surr. Ct. 1953); *In re Shehan's Will*, 203 Misc. 658, 117 N.Y.S.2d 152 (Surr. Ct. 1952). See majority and dissenting opinions in *Manchester v. Cleveland Trust Co.*, 114 N.E.2d 242 (Ohio App. 1953). See also *Stone v. Baldwin*, 348 Ill. App. 225, 109 N.E.2d 244 (1952), sustaining trustee except as to salary received for new position obtained by voting stock in estate.

⁷⁷ *Stone v. Baldwin*, 414 Ill. 257, 111 N.E.2d 97 (1953). The predecessor trustee was a party to the litigation mentioned in note 76 supra. Other interesting cases are: *Glasser v. Essaness Theatres Corp.*, 414 Ill. 180, 111 N.E.2d 124 (1953), involving a problem similar to that in the leading case of *Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545, 62 A.L.R. 1 (1928); *Gibson v. Security Trust Co.*, 201 F.2d 573 (4th Cir. 1953) (involving a secret trust for an employee of a trust or an employee of a trust company); *In re Kolbeck's Estate*, 27 N.J. Super. 135, 99 A.2d 175 (App. Div. 1953) (trustee removed for taking position hostile to trust even though trust might not suffer thereby).

⁷⁸ *Conway v. Emeny*, 139 Conn. 612, 96 A.2d 221 (1953).

adopted a reciprocal statute⁷⁹ as has North Dakota.⁸⁰ Oklahoma now permits a foreign trust company to act in ancillary proceedings if the domiciliary state has a reciprocal statute, but forbids a branch office of, or solicitation by, a foreign corporate fiduciary in Oklahoma.⁸¹

The movement to authorize corporate fiduciaries to hold trust securities in the name of a nominee, in violation of the earmarking rule, has made further progress. Statutes authorizing nominee registration were adopted in North Dakota,⁸² Tennessee⁸³ and Utah.⁸⁴ Connecticut amended its statute to permit a bank or trust company to hold stock in the name of its nominee when acting as custodian for individual trustees.⁸⁵

There have not been too many decisions in recent years about the implied powers of trustees, perhaps because of improved draftsmanship and better form books and treatises,⁸⁶ and perhaps because of the modern tendency to give a trustee the implied powers that are commensurate with his duties. This latter trend is well illustrated by several current decisions recognizing implied powers under the circumstances of particular cases to make a lease for ten years with a five-year renewal option,⁸⁷ to compromise a claim in litigation⁸⁸ and to incorporate a business which the trustee was empowered to operate.⁸⁹

VII

INVESTMENTS

The steam roller continued inexorably but more slowly to break down the opposition in the relatively few states in which the prudent man investment rule has not been adopted completely or on a modified basis. Florida adopted the prudent man rule for all fidu-

⁷⁹ Ill. Rev. Stat. c. 32, §§ 157.102, 157.166, 287a; c. 3, § 152 (1953).

⁸⁰ N.D. Laws 1953, c. 98.

⁸¹ Okla. Laws 1953, tit. 58, c. 3a.

⁸² N.D. Laws 1953, cc. 103, 104.

⁸³ Tenn. Laws 1953, c. 165.

⁸⁴ Utah Code Ann. tit. 7, c. 5, §§ 14.1, 14.2 (Supp. 1953).

⁸⁵ Conn. Gen. Stat. § 193c(3) (Supp. 1953).

⁸⁶ For example, the useful book by Gilbert T. Stephenson, *Drafting Wills and Trust Agreements: Administrative Provisions* (1952), reviewed by Collins, 41 Calif. L. Rev. 159 (1953).

⁸⁷ In *In re Clayton's Estate*, 259 P.2d 617 (Colo. 1953), the trustee was a municipality and leased property to a golf club to produce a rental to carry out the testator's charitable project; the lease was not confirmed by the court as would have been necessary if the trustee had had no power to make a lease.

⁸⁸ *Spencer v. Harris*, 252 P.2d 115 (Wyo. 1953) (recognizing the power but not approving the compromise attempted in this case).

⁸⁹ *Mann v. Peoples-Liberty Bank and Trust Co.*, 256 S.W.2d 489 (Ky. 1953) (the trustee having a discretionary power to make investments, with the limitation on the implied power that the trustee must retain control of the corporation).

ciaries except guardians of veterans.⁹⁰ Connecticut extended the prudent man rule to guardians and conservators as well as trustees.⁹¹ Investment statutes were broadened in Georgia⁹² and in Maine.⁹³ In Pennsylvania trustees were authorized to invest up to one-third in the shares of investment companies of a certain capitalization and with certain dividend records.⁹⁴

Enabling legislation for the creation of common trust funds was adopted in Nebraska,⁹⁵ New Hampshire⁹⁶ and Tennessee,⁹⁷ the latter two adopting the uniform act.

Litigation of local interest continued in New York⁹⁸ and New Jersey⁹⁹ as the states with the modified prudent man rule learned to live with their new statutes.

The only cases noted which were of general interest were those involving the troublesome problem of retaining stock in a falling market or of selling too soon in a rising market. In a Pennsylvania case¹⁰⁰ the testator, who died in November of 1929, owned 5,250 shares of United Gas Improvement common stock. The executors sold 3,550 shares at a profit and turned 1,700 shares over to the trustees at a reappraised value of \$20.50 a share in 1932. The corporate trustee recommended a sale at about 20 in 1934 but the individual trustee (and life beneficiary) thought that they should try for 23. The stock did not again reach even 19. In 1937 the trustees sold 200 shares at 14 and the balance in 1942 at 4. By 1942 the corporate trustee was recommending the purchase of United Gas Improvement to other customers. The court nevertheless concluded that the trustees under a general power to retain had not failed to use "common skill and prudence" and were not surchargeable.¹⁰¹

VIII

SPENDTHRIFT TRUSTS

Dean Griswold in his book on *Spendthrift Trusts* suggested a re-examination of several aspects of this peculiarly American institution,

⁹⁰ Fla. Laws 1953, c. 28154.

⁹¹ Conn. Gen. Stat. § 2198c (Supp. 1953).

⁹² Ga. Laws 1953, act 149, authorizing fiduciaries to deposit trust funds in an interest-paying account with a bank or trust company to the extent of federal insurance.

⁹³ Me. Laws 1953, c. 70 (limited authority to invest in endowment insurance policies and annuity contracts).

⁹⁴ Pa. Laws 1953, act 56.

⁹⁵ Neb. Laws 1953, L.B. 253.

⁹⁶ N.H. Laws 1953, c. 109.

⁹⁷ Tenn. Laws 1953, c. 148.

⁹⁸ 1953 Survey of New York Law, 28 N.Y.U.L. Rev. 1491.

⁹⁹ Fidelity Union Trust Co. v. Price, 11 N.J. 90, 93 A.2d 321 (1952); Plainfield Trust Co. v. Bowlby, 25 N.J. Super. 44, 95 A.2d 429 (Ch. Div. 1953).

¹⁰⁰ In re Mereto's Estate, 373 Pa. 466, 96 A.2d 115 (1953).

¹⁰¹ Accord, Ditmars v. Camden Trust Co., 10 N.J. 471, 92 A.2d 12 (1952).

including the rule that a settlor could not create a spendthrift trust for himself.¹⁰² While it would, of course, be shocking to permit a person to shield his substantial wealth from the claims of his creditors it might be defensible to permit a settlor during a period of prosperity to set aside enough for his support in times of adversity.¹⁰³ The law now permits a discretionary trust for the settlor, so that a transferee or a creditor cannot compel the trustee to pay any part of the income or principal.¹⁰⁴ In a current Massachusetts decision, however, the traditional view was confirmed. The settlor created an insurance trust, with the only asset a \$100,000 life insurance policy on the life of his wife, with the income payable to the settlor for his life and also any portion of the principal which the trustees deemed necessary for the settlor's maintenance or which he requested in writing. At the death of the settlor the income and later the principal were to be paid to the settlor's son. There was an express spendthrift clause: the interest of the beneficiary could not be anticipated, alienated or assigned, and was not subject to the claims of creditors. In 1948 (eight years after the creation of the trust), the settlor assigned all of his right, title and interest in the trust to his son. The settlor's wife died in 1951, and thereafter the settlor sought a declaratory decree to determine the effectiveness of his voluntary assignment. Earlier cases had held that a settlor could not create a spendthrift trust and keep the trust fund beyond the reach of creditors. The court in the present case held that the same underlying principle was applicable to voluntary alienation.¹⁰⁵

The spirit of unrest with respect to the law of spendthrift and indestructible trusts is illustrated by the current critical comment on the law of various states such as California,¹⁰⁶ Michigan,¹⁰⁷ North

¹⁰² Griswold, *Spendthrift Trusts* § 474 (2d ed. 1947). See also Custigan, *Those Protective Trusts Which Are Miscalled "Spendthrift Trusts"* Reexamined, 22 Calif. L. Rev. 471 (1934); Porter, *Spendthrift Trusts for Settlers*, 68 *Trusts & Estates* 102 (1939).

¹⁰³ Somewhat in this direction, New York has adopted a new statute (N.Y. Laws 1953, c. 628) exempting from the rules against perpetuities and accumulations retirement trusts for self-employed persons which may be exempt under federal income tax laws. Such trusts (if irrevocable by their terms) may not be revoked under § 23 of the Personal Property Law. Query: will such trusts be subject to the claims of creditors?

¹⁰⁴ See proposed change in § 156(3) in *Restatement of the Law Continued: Trusts*, Tentative Draft No. 1 at 94 (May 1, 1953), relying on *Herzog v. Commissioner*, 116 F.2d 591 (2d Cir. 1941), *Griswold, Spendthrift Trusts* §§ 481, 482.

¹⁰⁵ *Merchants Nat. Bank v. Morrissey*, 329 Mass. 601, 109 N.E.2d 821 (1953), citing *Restatement, Trusts* § 156, comment e (1935).

¹⁰⁶ Note, 40 Calif. L. Rev. 441 (1952).

¹⁰⁷ Fratcher, *Restraints on Alienation of Equitable Interests in Michigan Property*, 51 Mich. L. Rev. 309 (1953).

Carolina,¹⁰⁸ New York¹⁰⁹ and Wisconsin.¹¹⁰ There was also law review speculation on the unsettled law with respect to the tort liability of beneficiaries of spendthrift trusts.¹¹¹

IX

CHARITABLE TRUSTS

There is a growing awareness of the public interest in the honest, efficient administration of charitable trusts, as shown by the recent reports of government committees in England¹¹² and in the United States.¹¹³ It is clear that charitable trusts and foundations will not much longer enjoy the relative secrecy and anonymity which they have enjoyed. The Cox Committee has recommended that charities disclose receipts, expenses and contributions or grants¹¹⁴ and bills have already been introduced to implement these recommendations.¹¹⁵ A book prepared and published under the sponsorship of the Russell Sage Foundation¹¹⁶ advocates public accountability but not government control.

It is by no means certain that the definition of charity either in the British Commonwealth or in the United States is scientific or demonstrably in the public interest. The English precedents are discussed in a provocative article in the *Canadian Bar Review*.¹¹⁷ The realism of tax law, and the need for tax revenues, will sooner or later force a re-examination of exemptions which are not justified in terms of public benefit. Here is an opportunity for a co-operative project for social scientists and lawyers to draft a charitable trust statute for the age of the second Elizabeth.

In addition to the questioning attitude toward the whole institu-

¹⁰⁸ Stephenson, *The North Carolina Spendthrift Trust Statute*, 31 N.C.L. Rev. 175 (1953).

¹⁰⁹ Niles, *Should the New York Rule against Perpetuities Be Changed?*, Address at the 1953 Meetings of Banking Law Section, N.Y. State Bar Ass'n, pp. 30-44 (1953).

¹¹⁰ Comment, 36 Marq. L. Rev. 167 (1952).

¹¹¹ Notes, 57 Dick. L. Rev. 220 (1953), 28 Notre Dame L. Rev. 509 (1953).

¹¹² Report of the Committee on the Law and Practice Relating to Charitable Trusts (1952) (Nathan Report), reviewed by Logan, 16 Mod. L. Rev. 343 (1953), and Simes, 2 Am. J. Comp. L. 555 (1953).

¹¹³ Report of the Select Committee to Investigate Foundations (1953), reviewed by Logan, 16 Mod. L. Rev. 353 (1953); Wynn, *Charitable Organizations: A Re-examination of Underlying Policies of Law*, 92 Trusts & Estates 762 (1953), based on an address delivered before the Section of Real Property, Probate and Trust Law of the American Bar Association at the Boston meeting, August 1953.

¹¹⁴ Wynn, *supra* note 113, at 764.

¹¹⁵ H.R. 5628 & H.R. 5629, 83d Cong., 1st Sess. (1953).

¹¹⁶ Taylor, *Public Accountability of Foundations and Charitable Trusts* (1953), reviewed by Bogert, 29 N.Y.U.L. Rev. 532 (1953).

¹¹⁷ Fridman, *Charities and Public Benefit*, 53 Can. B. Rev. 537 (1953).

tion of the charitable trust, there is a continued interest in the *cy pres* doctrine in both its judicial¹¹⁸ and legislative aspects.¹¹⁹

¹¹⁸ Fisch, *The Cy Pres Doctrine and Changing Philosophies*, 51 Mich. L. Rev. 375 (1953). See also the same author's book, *The Cy Pres Doctrine in the United States* (1950), reviewed by Marcus, 13 Mont. L. Rev. 115 (1952); Gray, *The History and Development in England of the Cy Pres Principle in Charities*, 33 B.U.L. Rev. 30 (1953); Recent Case, 5 Baylor L. Rev. 205 (1953).

¹¹⁹ *Trustees of New Castle Common v. Gordy*, 93 A.2d 509 (Del. 1952), 101 U. of Pa. L. Rev. 1087 (1953).

SUCCESSION

THOMAS E. ATKINSON

THE societal importance of the law of succession is indicated by the fact that it is impossible to comment upon, or even to cite, all of the year's decisions of general interest within the space allotted to this article. Many cases—indeed certain whole topics—are omitted on a basis which is largely one of arbitrary selection, and a far greater number because they are principally of local interest, or are of importance only to the litigants. Beyond these there is a huge volume of unreported cases in the trial courts and a still greater mass of succession matters disposed of by way of compromise, default or in the routine processes of the probate courts. The juridical chaff and the incalculatable mass of unreported activities, because of their very bulk, are probably more significant than the decisions here winnowed because of their professional interest. Even without estimating the size of the obscured part of the pyramid, it must be fairly clear that the courts of probate touch the intimate lives of more people than even the traffic or the police courts.

On this account increased emphasis should be placed upon legislation which improves the law of intestacy and wills and expedites our probate and administration machinery. The Model Probate Code has suggested a pattern for reform, and during the year Indiana became the second state to adopt a new code largely based upon its example.¹ Elsewhere there was a typical array of amendments and new provisions dealing with isolated problems.² Estate planning literature³ continued to overshadow in volume articles dealing with tradi-

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¹ See Alexander, *A Modern Probate Code*, 92 *Trusts & Estates* 353 (1953). The Indiana Code, which becomes effective January 1, 1954, has some rough spots that must be smoothed by amendments, and the failure to include the Uniform Ancillary Administration and Probate Acts seems regrettable. In Texas a proposed new code passed one house of the Legislature and had committee approval in the other. See 16 *Texas B.J.* 498-99 (1953). While this proposal also shows the influence of the Model Probate Code, it is largely an improvement and systemization of the indigenous Texas law of succession which has many admirable features.

² See notes 23, 29, 35, 36, 38, 88, 100, 113, 147, 173 *infra*. Ohio and Oklahoma made substantial changes in various parts of their probate codes. Ohio Sen. Bill No. 40, enacting Ohio Rev. Code § 2107.18.1, and amending §§ 2105.21, 2107.39, 2107.41, 2109.13, 2111.23, 2113.23, 2113.50, 2117.23, 2129.10 (Supp. 1953); Okla. Stat. Ann. tit. 84, § 232 (Supp. 1953).

³ See Alexander, *Personal Liability of Executors and Trustees for Federal Income, Estate, and Gift Taxes*, 9 *Tax L. Rev.* 1 (1953); Berger, *Some Practical Aspects of Business Buy-and-Sell Agreements*, 57 *Dick. L. Rev.* 277 (1953); Berman & Berman, *Estate Planning*, 57 *Dick. L. Rev.* 307 (1953); Hamilton, *Insurance in Estate Planning*,

tional aspects of decedents' estates. It is becoming increasingly apparent that taxes are affecting the law as well as the economics of inheritance.⁴

During 1953 the Israeli Succession Bill underwent further study and amendment, particularly in connection with the rights and liabilities of heirs.⁵ Never before has the comparative law approach been applied so diligently in molding a practical probate code. Scholars have already recognized the Bill as a virtual treasure house of ideas and persons interested in legislative reform of the American law of succession cannot afford to overlook the Bill's solutions for problems which are common to all systems of inheritance.

I

NONTESTAMENTARY SUCCESSION

Descent and Distribution.—While ambiguities in our tables of inheritance⁶ are more common than is generally supposed, each year sees only a few cases in which these matters are litigated. A New Jersey court held that, under the provision that property "be distributed equally to the next of kindred, in equal degree . . . and their legal representatives," first cousins take per capita but must share

7 Ark. L. Rev. 249 (1953); Hawley, *The Use of Life Insurance in Planning Small Estates*, 25 Rocky Mt. L. Rev. 149 (1953); Knight, *Wills for Oil Men*, 91 Trusts & Estates 888 (1952); Lovell, *Administering the Marital Deduction*, 92 Trusts & Estates 812 (1953); Pollock, *Considerations in Estate Planning and Will Drafting*, 22 Tenn. L. Rev. 43 (1951); Tarleau, *Estate Planning Technique*, 13 La. L. Rev. 3 (1952); *Tax Trap of Joint Tenancy*, American Bar Ass'n Probate and Trust Law Divisions, Real Property, Probate and Trust Law Section, Proceedings 35 (1953), also printed in 92 Trusts & Estates 784 (1953); Note, 28 Ind. L.J. 409 (1953).

Most of the above deal principally or entirely with tax aspects. Of a different stamp is Stephenson, *Drafting Wills and Trust Agreements: Administrative Provisions* (1952), which has been extensively and favorably reviewed in 39 A.B.A.J. 40 (1953), 57 Dick. L. Rev. 176 (1953), 31 Texas L. Rev. 460 (1953), 101 U. of Pa. L. Rev. 435 (1952), 39 Va. L. Rev. 419 (1953).

Sargent, *Draftsmanship: Wills and Trusts*, American Bar Ass'n Probate and Trust Law Divisions, Real Property, Probate and Trust Law Section, Proceedings 97 (1953), also printed in 92 Trusts & Estates 746 (1953), contains drafts of several wills with sensible comments, lightly put, on many aspects of planning. The second edition of *An Estate Planner's Handbook* containing a new collection of annotated forms has appeared under the joint authorship of the late Mayo A. Shattuck and James F. Farr. A symposium of opinions on sixteen vital questions with regard to wills and administration appeared in 31 Can. B. Rev. 353 (1953). Dealing with ethical and practical as well as legal aspects, it has a broader appeal than the mass of American literature in the field of succession.

⁴ See p. 677 *infra*.

⁵ Yadin, *The Proposed Law of Succession for Israel*, 2 Am. J. Comp. L. 143 (1953). See note 10 *infra*.

⁶ See Todd v. Thedford, 253 S.W.2d 961 (Ark. 1953); *Godwin v. Marvel*, 99 A.2d 354 (Del. Orphans Ct. 1953); Toelle, *Succession under the Model Probate Code, Some Comparisons with the Montana-California Law*, 13 Mont. L. Rev. 13 (1952).

with cousin's children and grandchildren who take the share which their predeceased ancestor would have taken if he had survived.⁷ To the argument of the first cousins that this results in dividing the estate into small parts, the court declared its belief that the statute clearly provides for representation and that such criticism should be addressed to the legislature. The Michigan court allowed representation in case of children of a deceased brother of the half blood so that they could share nonancestral property with a sister of the whole blood under a statute of the familiar type which provides that half blood inherits equally with the whole blood in the same degree unless the property came from an ancestor, in which case those not of the blood of the ancestor shall be excluded.⁸ The ancestral property doctrine, entirely abolished in most states, was held applicable in a North Carolina case where the intestate, who had inherited the property in common with another relative, later received title by a voluntary partition deed from his cotenant.⁹

The English Inheritance (Family Provision) Act of 1938 permitted, within certain limits, an allowance to members of testator's family when the will did not make sufficient provision for their permanent maintenance. Most of the limitations are removed by the Intestate's Act, 1952, which also extends the maintenance principle to cases of intestacy.¹⁰ Thus the English courts now may order a departure from the normal intestate scheme in favor of the lame child or the ten-year-old orphan at the expense of his more fortunate or older brothers and sisters. While many of our states permit substantial allowances for family support these are limited in duration to the period of administration. Except for this temporary support our common-law jurisdictions permit a parent to disinherit his children by willing his property to others. This was reiterated in an Illinois case denying a first wife's claim for support money for minor children under the terms of a divorce decree.¹¹

Henrietta E. Garrett died intestate in 1930 with an estate of over \$17,000,000 and more than 26,000 persons claimed to be her next of kin. The resulting litigation was closed in 1953 with the

⁷ In re Allen's Estate, 23 N.J. Super. 229, 92 A.2d 857 (Ch. Div. 1952).

⁸ In re Coughlin's Estate, 336 Mich. 279, 57 N.W.2d 884 (1953).

⁹ Elledge v. Welch, 238 N.C. 61, 76 S.E.2d 340 (1953). Questions as to what is "identical property" within the meaning of Ohio's "half and half statute" were litigated in *McMillan v. Krantz*, 94 Ohio App. 9, 114 N.E.2d 289 (1952) (improvements on real property—yes); *Millar v. Millar*, 114 N.E.2d 119 (Ohio App. 1953) (stock dividends—no).

¹⁰ See Note, 16 Mod. L. Rev. 206 (1953). This principle is included in the new Israeli code. 1952 Annual Surv. Am. L. 592, 28 N.Y.U.L. Rev. 655 (1953).

¹¹ *Cooper v. Cooper's Estate*, 350 Ill. App. 37, 111 N.E.2d 564 (1953).

finding of the Pennsylvania court that three first cousins were entitled to her estate.¹² The case suggests the wisdom of eliminating "the laughing heir," as does the present Pennsylvania statute.¹³ In absence of first cousins or closer relatives there is no reason why our statutes should not provide for escheat of intestate estates.¹⁴

Pretermitted Children.—This topic fascinates the note writers.¹⁵ The New York case of *In re Faber's Estate*¹⁶ involved the nature of an inter vivos settlement, which, under many statutes, bars a child not mentioned in the parent's will. The testator left an estate of \$54,000 in trust for his father and for his wife who was the principal life beneficiary, with the remainder to his first daughter. After execution of the will another daughter was born, and shortly thereafter the testator made his two daughters equal beneficiaries of \$29,000 of life insurance. It was held that the insurance transaction constituted a settlement which precluded the second daughter from taking her intestate share against the will. The case makes clear in New York that a settlement need not antedate or be contemporaneous with the will in order to bar the unmentioned child, and that whether a transaction is a settlement for purposes of the statute depends upon the testator's intention. As a practical matter this eliminates the claim that the deposit of coins in a piggy bank or the naming of the child as the beneficiary of a baby bond is a settlement within the purport of the statute.

This decision is reasonable and may have influence in other jurisdictions as to the point involved. However, it does not obscure the fact that typical statutes designed to protect the pretermitted child may work inequality between children. Under a state of facts such as in the *Faber* case except that neither child is mentioned nor provided for in any manner, the afterborn daughter would be entitled to take

¹² *In re Garrett's Estate*, 372 Pa. 438, 94 A.2d 357, cert. denied, 345 U.S. 996 (1953); see also *In re Garrett's Estate*, 371 Pa. 284, 89 A.2d 531 (1952). See *Ruona v. Fitzpatrick*, 111 F. Supp. 538 (D.R.I. 1953), for the unsuccessful claim of alleged heirs to an intestate who died in 1789.

¹³ Pa. Stat. Ann. tit. 20, § 1.3 (1950), cutting off intestate succession with first cousins. See Model Probate Code § 22(b)(6) and comment showing similar limitations in England, Kansas, District of Columbia and Maryland.

¹⁴ Cf. *In re Witte's Estate*, 174 Kan. 360, 255 P.2d 1039 (1953), and *In re Gonsky's Estate*, 55 N.W.2d 60 (N.D. 1952), awarding to the United States the estates of heirless persons who died in care of the Veteran's Administration on statutory and contractual bases, in preference of the state's claim to an escheat.

¹⁵ On relationship between the antilapse and pretermitted-heirs statutes see Note, 14 Mont. L. Rev. 92 (1953). On the effect of failure to mention a child when the wife is known to be pregnant see Note, 41 Ky. L.J. 351 (1953). See also note 16 *infra*.

¹⁶ 305 N.Y. 200, 111 N.E.2d 883 (1953). The opinion in the intermediate court is noted in 28 N.Y.U.L. Rev. 229 (1953); 2 Buff. L. Rev. 168 (1952); 38 Va. L. Rev. 1088 (1952).

one-third of the estate and the first daughter nothing since the New York statute protects only the afterborn. Even in jurisdictions where all omitted children are protected, the mere mention of the first daughter in the will would cause a similar inequality in absence of some generic testamentary words which could be deemed a mention of afterborn children or of some transaction which could qualify as a settlement upon the afterborn.¹⁷

Advancements.—Harold I. Elbert, Esq., has published the first installment of a study¹⁸ of this subject, valuable not only for its intrinsic worth, but also because the topic has received no comprehensive treatment for many years. The article cites very few cases decided in the last decade. Most of the recent decisions noted in the *Survey* have dealt with advancements by means of joint account or naming a beneficiary of savings bonds wherein the parent retains rights of enjoyment during his lifetime.¹⁹ Except for such cases, it may be that the importance of the subject is declining because persons of modest estate tend to retain their property in fear of inflation, while gifts to children prompted by tax considerations are usually made by one who leaves a will so that the law of advancements is inapplicable.

Aliens.—A decision²⁰ of the New York Court of Appeals sustained the validity of legislation providing for the deposit of legacies with the city treasurer, when it appeared that the foreign legatee would not receive the benefit thereof in his own country. It was held that the act does not enter the field pre-empted by the national Trading with the Enemy Act since the latter was designed and implemented only to promote the national defense. Furthermore it was considered that due process is not violated, since the legatee is not deprived of his property, but rather it is preserved for him when otherwise he would lose all possible benefit of it. Under another type of statute the California court decided that a citizen of Yugoslavia could not

¹⁷ See 1952 Annual Surv. Am. L. 597-98, 28 N.Y.U.L. Rev. 660-61 (1953). See also p. 674 *infra*.

¹⁸ Elbert, *Advancements*: I, 51 Mich. L. Rev. 665 (1953). See also Notes, 69 L.Q. Rev. 169 (1953), 31 N.C.L. Rev. 207 (1953). Cf. Burk, *Collation in Louisiana*: Part II, 27 Tulane L. Rev. 232 (1953); Elbert, *Advancements and the Right of Retainer in Missouri*, 18 Mo. L. Rev. 249 (1953).

¹⁹ See 1949 Annual Surv. Am. L. 830; 1952 Annual Surv. Am. L. 596, 28 N.Y.U.L. Rev. 659 (1953). While declaring that the doctrine of advancements does not apply in case of testacy, *In re Hall's Will*, 120 N.Y.S.2d 188 (Surr. Ct. 1953), permits an advance to testator's son to reduce the corpus of the trust in which the son had a life interest.

²⁰ *In re Braler's Estate*, 305 N.Y. 148, 111 N.E.2d 424, motion to amend remittitur granted, 305 N.Y. 691, 112 N.E.2d 774 (1953). See also Boyd, *Treaties Governing the Succession to Real Property by Aliens*, 51 Mich. L. Rev. 1001 (1953).

inherit land because at the time of the intestate's death a citizen of the United States would not as a matter of uniform law inherit Yugoslavian property devised to him.²¹ The upper court declared that it will follow the finding of the trial judge as to the foreign law and practice whenever there is substantial evidence to support the finding and that the case does not differ from one involving any ordinary issue of fact. Another California case²² held that a statute limiting the time within which an heir must claim is tolled in favor of a Greek claimant for the period of the German occupation, during which he was not permitted to sue on account of the Trading with the Enemy Act.

Illegitimates.—The Supreme Court of Illinois held that an illegitimate's half brother and two grandchildren of an illegitimate half brother cannot inherit under a statute providing that an illegitimate child is the heir of his mother, and of any maternal ancestor.²³ The result came from applying a literal meaning to "ancestor" and from the fact that the Legislature had, perhaps unwittingly, eliminated the words "and of any person from whom its mother might have inherited if living." A more equitable result was reached in an Alabama case²⁴ wherein illegitimate children of an illegitimate half sister were permitted to inherit under a statute providing that the illegitimate is considered as the heir of his mother and inherits as if born in lawful wedlock. Thus the Alabama statute permits the illegitimate to inherit through, as well as from, his mother.

The remedial effect of the legitimation statute is apparent in a Texas decision²⁵ wherein the father, having three illegitimate children, made a will in favor of two of them. Thereafter he had two more illegitimate children and still later he married the mother of his bastard brood. On his death the afterborns were permitted to take one-fifth each under the pretermitted child statute. Although nothing is made of it, the case illustrates the uneven working of the latter statute, since the child who was born before the will but was not mentioned in it apparently takes no part of the father's estate.

Adoption.—Two New York cases illustrate the difficulties which arise when limited provisions for inheritance in case of adoption are separated from the general statutes relating to descent and distribu-

²¹ *In re Arbulich's Estate*, 257 P.2d 433 (Cal. 1953); see also *In re Karhan's Estate*, 118 Cal. App.2d 240, 257 P.2d 649 (1953) (bequest to charity in Czechoslovakia).

²² *In re Caravass' Estate*, 40 Cal.2d 33, 250 P.2d 593 (1952).

²³ *Spencer v. Burns*, 413 Ill. 240, 108 N.E.2d 413 (1952), noted in 31 Chi-Kent Rev. 268 (1953), 2 De Paul L. Rev. 300 (1953). Cf. 1952 Annual Surv. Am. L. 596, 28 N.Y.U.L. Rev. 659 (1953). And see Ill. Rev. Stat. c. 3, § 163 (1953).

²⁴ *Hudson v. Reed*, 66 So.2d 909 (Ala. 1953).

²⁵ *Gadd v. Lynch*, 258 S.W.2d 168 (Tex. Civ. App. 1953). See also p. 672 *supra*.

tions. Both cases involve inheritance from the adopted child. In the first²⁶ it was held that by virtue of a statutory provision forbidding inheritance by the natural parent, cousins of the adopted parent take instead of a natural brother. Perhaps the Legislature intended to exclude the natural parents' kindred but the case is not specifically provided for and there is reasonable basis for the view that the situation should be governed by the general statute of descent. In another case²⁷ it was held that the nephew of the adoptive mother takes to the exclusion of children of the mother's deceased nephew since the deceased and the nephews were cousins by adoption and the general statute did not permit representation beyond the descendants of brothers' and sisters' children.

In an important Kentucky case²⁸ the will left a life estate to a woman with remainder to her heirs. After the testator's death the life tenant adopted two girls, who were held entitled to share the remainder with the natural daughter of the life tenant. The court not only recognized the claims of children adopted after the testator's death, but also, reversing a prior decision, applied the adoption statute at the time of the death of the life tenant rather than the one in force at the testator's death.

The statutory scheme of putting the adopted child into the adoptive family and taking him out of the family of his birth for all purposes of inheritance by, through or from the adopted child gained adherents during the year.²⁹ Several writers also expressed their decided preference for this solution.³⁰

Limitations on Charitable Bequests.—The bequest of the bulk of one's property to a state school for the blind for the benefit of the children in attendance was held to fall within the prohibition of a Mississippi statute declaring that "no person . . . shall . . . bequeath or devise more than one-third of his estate to any charitable, religious,

²⁶ *In re Fodor*, 202 Misc. 1100, 117 N.Y.S.2d 331 (Surr. Ct. 1952), disapproved in 27 St. John's L. Rev. 343 (1953).

²⁷ *In re Meyer's Estate*, 204 Misc. 265, 122 N.Y.S.2d 686 (Surr. Ct. 1953); cf. *In re Kruse's Estate*, 260 P.2d 969 (Cal. App. 1953) (brother's adopted child is not his "descendant" within succession statute).

²⁸ *Major v. Kammer*, 258 S.W.2d 506 (Ky. 1953); see *Bradford v. Johnson*, 237 N.C. 572, 75 S.E.2d 632 (1953) (to "children" of nephews and nieces; distinction taken between adoptions before will and after testator's death).

²⁹ Ind. Ann. Stat. tit. 6, § 208 (Burns 1953); Ore. Laws 1953, c. 650; cf. Nev. Laws 1953, c. 332; Wis. Laws 1953, c. 398. See also *In re Kay's Estate*, 260 P.2d 391 (Mont. 1953) (allowing inheritance from natural father although children had been adopted by their divorced mother's second husband). See also Note, 31 Can. B. Rev. 571 (1953); 1951 Annual Surv. Am. L. 685.

³⁰ *Worthing, Inheritance and Testamentary Rights with Respect to Adopted Children*, [1953] Wis. L. Rev. 38; Notes, 2 De Paul L. Rev. 63 (1952); 32 Neb. L. Rev. 68 (1952); cf. Recent Cases, 24 Miss. L.J. 253 (1953).

educational or civil institutions." It was declared that the bequest was not saved by application of the principle that the state is not restricted by statutory language of general import. However, the gift was validated as to one-third of the estate since a reasonable construction of the legislation is that bequests are voidable only as to the excess, and the testator would doubtless have preferred partial validity to a total failure of the bequest.⁸¹

Charitable gifts were contested in a California case by nieces and nephews, persons entitled to take under the charitable-limitation statute, and also by stepsons, who were not so entitled but who under the general statute took intestate property inherited by decedent from the latter's spouse. It was held that the stepsons had no right to question the validity of the bequests since the charitable-limitations statute was a complete exposition of the law of charitable bequests.⁸² Professor Joslin has a thoughtful article⁸³ showing that the California statute, as now interpreted, can be circumvented by a testamentary gift over to some person not within the class who can object to the gift. His thesis is that, by re-examination of the decisions and without change in the statute, the court could reach the more reasonable result of striking down the gift over as part of the prohibited charitable gift. This is an interesting possibility, although the technique encounters more difficulty when the charitable gift is nonresidual and there is a bequest of the residue to an individual who is not within the class of persons protected by the statute.

Spouse's Share.—The English Intestate's Estates Act of 1952⁸⁴ enlarged the spouse's share, as does current legislation in two of our states.⁸⁵ Likewise there were several statutory increases in the amounts of family allowances.⁸⁶

⁸¹ Mississippi School for the Blind v. Armstrong, 216 Miss. 348, 62 So.2d 369 (1953).

⁸² In re Jephcott's Estate, 115 Cal. App.2d 277, 251 P.2d 1001 (1953). See also In re Holyland's Will, 116 N.Y.S.2d 628 (Surr. Ct. 1952) (cousins are not "descendants" who may object).

⁸³ Joslin, Re: Restrictions on the Testamentary Gift to Charities in California, 25 So. Calif. L. Rev. 419 (1952); see also Joslin, Florida's Charitable "Mortmain" Act, 7 Miami L.Q. 488 (1953).

⁸⁴ 15 & 16 Geo. 6 & 1 Eliz. 2, c. 64. See also note 10 supra.

⁸⁵ N.D. Laws 1953, c. 308 (when intestate left no issue); S.D. Laws 1953, c. 456. See Note, 19 Brooklyn L. Rev. 273 (1953). Reversing an earlier decision, it was held in Krile v. Swiney, 413 Ill. 350, 109 N.E.2d 189 (1952), 31 Chi-Kent Rev. 267 (1953), [1953] U. of Ill. L. Forum 147, that waiver of dower was not a condition precedent to vesting of a one-half fee interest in land of the deceased spouse.

⁸⁶ Colo. H.B. No. 345 (1953); Kan. Laws 1953, c. 272; N.D. Laws 1953, c. 206; Wis. Laws 1953, c. 259. See Note, 18 Mo. L. Rev. 84 (1953). Two cases awarded allowances to the wife in spite of a separation. In re Quinn's Estate, 243 Iowa 1271, 55 N.W.2d 175 (1952); In re Schwab's Will, 122 N.Y.S.2d 574 (Surr. Ct. 1953); cf. In re Guttman's Estate, 349 Ill. App. 58, 110 N.E.2d 87 (1953) (antenuptial settlement).

There have been further decisions on the problem³⁷ of whether, in light of the fact that the spouse's elective share qualifies for the marital deduction, the share should be computed before or after taxes. The cases so far tend to divide upon the basis of whether or not the state allows apportionment of estate taxes according to benefits received with due allowance for exemption from the tax. Thus, the jurisdictions allowing apportionment hold that the elected share is computed before taxes,³⁸ while the courts which do not apportion insist that the share is of the part remaining after estate taxes have been paid.³⁹

A comprehensive study⁴⁰ of recent developments in the right of election of the surviving spouse by Robert L. Klein, Esq., portrays the complicated state of the New York law as well as its frequent absence of realistic protection. Minimum protection was given by a New York decision which held that a trust, which was amendable and revocable and forbade the trustee from selling, leasing or mortgaging the trust property, could be set aside by the surviving husband as an illusory transfer.⁴¹ A similar result was reached in a Pennsylvania case wherein a trust of securities was not in terms revocable but the settlor reserved the powers to approve all changes

See *Benedict v. Lee*, 256 P.2d 507 (Ore. 1953), for evidence of a liberal judicial spirit toward grant of probate homestead to the surviving spouse. Cf. *In re Stanger's Estate*, 75 Ariz. 399, 257 P.2d 593 (1953) (no homestead in rental houses distinct from the main home).

³⁷ See 1952 Annual Surv. Am. L. 598, 28 N.Y.U.L. Rev. 661 (1953).

³⁸ *In re Fuchs' Estate*, 60 So.2d 536 (Fla. 1952). See also Neb. Laws 1953, c. 95. The problem in New York is the more limited one of the "top limit" of the elective share. See *In re Vitale's Will*, 118 N.Y.S.2d 773 (Surr. Ct. 1952); *In re Wolf's Estate*, 204 Misc. 356, 121 N.Y.S.2d 412 (Surr. Ct. 1953). Cf. *Baylor v. National Bank of Commerce of Norfolk*, 194 Va. 1, 72 S.E.2d 282 (1952), where the widow elected to take under the will which directed against apportionment under the statute. *Jerome v. Jerome*, 139 Conn. 285, 93 A.2d 139 (1952) (same, except no direction against apportionment). See also Conn. Rev. Gen. Stat. §§ 2203(c), 2204(c) (Supp. 1953); Neb. Laws 1953, c. 95.

³⁹ *Wachovia Bank & Trust Co. v. Green*, 236 N.C. 654, 73 S.E.2d 879 (1953); *In re Uihlein's Will*, 264 Wis. 362, 59 N.W.2d 641 (1953).

⁴⁰ 129 N.Y.L.J. 1604, col. 1 (May 13, 1953); 129 id. 1620, col. 1 (May 14, 1953); 129 id. 1636, col. 1 (May 15, 1953); 129 id. 1654, col. 1 (May 18, 1953); 129 id. 1674, col. 1 (May 19, 1953); 129 id. 1692, col. 1 (May 20, 1953).

⁴¹ *MacGregor v. Fox*, 280 App. Div. 435, 114 N.Y.S.2d 286 (1st Dep't 1952), aff'd, 305 N.Y. 576, 111 N.E.2d 445 (1953); see also *Gillette v. Madden*, 280 App. Div. 161, 112 N.Y.S.2d 543 (3d Dep't 1952), wherein it was held that the widow's complaint, alleging that his wife's deed without consideration was executed to defeat his rights and that she continued to exercise full dominion and control over the property, stated a cause of action. Cf. *In re Halpern's Estate*, 303 N.Y. 33, 100 N.E.2d 120 (1951), discussed in 1951 Annual Surv. Am. L. 688-89; 1952 Annual Surv. Am. L. 599-600, 28 N.Y.U.L. Rev. 662-63 (1953), holding that there were no elective rights against tentative bank accounts although the depositor, by the very nature of the transaction, retains the full and exclusive control over the deposit.

of investment, to receive the income and to consume the principal.⁴² Significantly in both cases the spouses' rights were dependent on total invalidity of the transaction, although in Pennsylvania the survivor may elect against any revocable transfer made after the effective date of recent legislation.

In an Illinois case⁴³ the widow was held barred, upon the principle of equitable estoppel, from claiming dower against the will which left her nothing when she had entered into a postnuptial settlement under which she had received other property. However, statutory waiver of the right to elect against the will was strictly construed in New York where the waiver attached to a will was held ineffective to bar the right of election under a later will making a similar disposition of property.⁴⁴

A postnuptial settlement does not bar the survivor from taking under the intestate laws in Texas,⁴⁵ but the contrary is true in Kansas.⁴⁶ In a Michigan case⁴⁷ a prenuptial agreement, having statutory recognition, concededly barred the spouse, and the problem presented was whether the property not necessary to satisfy the latter's contractual claims would pass under the intestate statute's provision for cases where there was a surviving spouse, or under the provisions "in any other case." It was held that the normal share of collateral relatives passed to them under the former provision, but the widow's share, of course minus what she took under the settlement, should go to those persons entitled under the provision "in any other case."

Cases of the year held that a spouse electing to take against the will may not take an intestate share in property not passing under the will,⁴⁸ while one who fails to renounce may share in the intestate property.⁴⁹ Both decisions are commendable since they tend to encourage the spouse to accept the will and thus avoid disrupting the

⁴² *Pengelly's Estate*, 374 Pa. 358, 97 A.2d 844 (1953). The trust was established before the effective date of a statute permitting the spouse to elect against a transfer wherein the grantor retains a power of appointment, a power of revocation or power to consume. See Note, 58 Dick. L. Rev. 70 (1953).

⁴³ *Dill v. Widman*, 413 Ill. 448, 109 N.E.2d 765 (1953).

⁴⁴ *In re Deffner's Estate*, 281 App. Div. 798, 119 N.Y.S.2d 443 (4th Dep't), aff'd, 305 N.Y. 783, 113 N.E.2d 300 (1953). Unless a property settlement expressly bars the spouse, it does not estop him from acting as executor and taking under the will. *In re Hadsell's Estate*, 260 P.2d 1021 (Cal. App. 1953).

⁴⁵ *Corgey v. McConnell*, 260 S.W.2d 99 (Tex. Civ. App. 1953) (contract also void as tending to promote divorce).

⁴⁶ *In re Gustason's Estate*, 173 Kan. 619, 250 P.2d 837 (1952); see *In re Snyder's Estate*, 100 A.2d 67 (Pa. 1953) (widow incompetent to testify concerning disclosure by husband).

⁴⁷ *In re Irwin's Estate*, 335 Mich. 143, 55 N.W.2d 769 (1952).

⁴⁸ *In re Uiblein's Will*, 264 Wis. 362, 59 N.W.2d 641 (1953).

⁴⁹ *Harmer v. Boggess*, 73 S.E.2d 264 (W. Va. 1952).

testamentary scheme. However, provisions of the will or of the statutes have often led to less fortunate rulings.

Traditionally, election on behalf of an insane widow is made by the equity court having jurisdiction over the guardianship estate. In determining that the will should be renounced the Virginia court declares that it was limited to a choice between the will and the provisions of law in case of renunciation and that it had no power to accept a modified plan proposed by the other beneficiaries under the will.⁵⁰ One judge, concurring in the result, argues with much force that the court should not be precluded from accepting a compromise offer if that would be of greater benefit to the widow.

The Arkansas statute permitted the widow to revoke her renunciation within the time allowed for her original decision unless there had been distribution in reliance on the renunciation. The section was held to permit a timely change of mind in case the first choice was to take under the will.⁵¹ The court reasoned that the Legislature was silent as to this matter because it was deemed to be of little consequence, since by taking no action at all the widow presumably indicates satisfaction with the will, and her express statement of satisfaction brings about no real change in position.

Two North Carolina cases allow acceleration in favor of remaindermen when the widow renounced a testamentary life interest in order to take an interest in fee, in spite of the fact that this cut off possible contingent interests since the remaindermen were to be determined at the widow's death.⁵² A third case,⁵³ also allowing acceleration, is notable because it preserves an annuity in favor of testator's sister in toto. The Iowa court⁵⁴ held that general and residuary legacies must abate pro rata to make up the spouse's elective share; the result is based principally upon statutory provisions but the court declares that the same conclusion should be reached at common law since it more nearly carries out the testator's intent than does the application of the normal rules for abatement.

With no specific statute involved, two cases⁵⁵ declared that a

⁵⁰ First Nat. Exchange Bank v. Hughson, 194 Va. 736, 74 S.E.2d 797 (1953), 39 Va. L. Rev. 717, 1 Wm. & Mary Rev. of Va. L. 206.

⁵¹ Townson v. Townson, 254 S.W.2d 952 (Ark. 1953).

⁵² Union Nat. Bank v. Easterby, 236 N.C. 599, 73 S.E.2d 541 (1952); Blackwood v. Blackwood, 237 N.C. 726, 76 S.E.2d 122 (1953). Cf. In re Uihlein's Will, 264 Wis. 362, 59 N.W.2d 641 (1953), where spouse was given a power of appointment.

⁵³ American Trust Co. v. Johnson, 236 N.C. 594, 73 S.E.2d 468 (1952). See In re Hickman's Estate, 41 Wash.2d 519, 250 P.2d 524 (1952) (denying homestead in property after acceleration following election).

⁵⁴ In re Maske's Estate, 243 Iowa 1394, 55 N.W.2d 474 (1952), 38 Iowa L. Rev. 769 (1953).

⁵⁵ Minor v. Higdon, 215 Miss. 513, 61 So.2d 350 (1952), 5 Ala. L. Rev. 320;

spouse who had contracted a bigamous marriage with another was estopped from sharing in the intestate estate of the lawful spouse. Under a Pennsylvania statute barring the spouse on the ground of wilful and malicious desertion, it was held that when the couple separated by mutual consent and the wife thereafter lived in adultery with another man desertion was sufficiently proved to preclude her from taking any part of her husband's estate.⁵⁶

Murder of Ancestor.—The Connecticut court held that a husband who intentionally shot his wife and was convicted of manslaughter could take under her will devising him her entire estate.⁵⁷ The court rejected the position that legal title does not pass to the killer and also the doctrine that a constructive trust will be imposed upon him. While some courts have accepted one or the other of these views, the opinion declared that either would violate the wills statute and in effect would recognize an unauthorized method of revocation. The court further indicated that, even if it were inclined to accept the minority position, it could not do so because a statute forbidding inheritance by one convicted of *murder in the first or second degree* had pre-empted the field and clearly implied that any other killer may inherit from his victim. It thus appears that the statute is important not only in the enumerated cases, but also as to situations which it does not cover.

Apparently the legislative requirement of conviction is intended to avoid inquiry into the nature of the slaying in the property action.⁵⁸ Statutes of this type will not bar the killer who commits suicide before trial, nor conceivably even one who pleads guilty to a murder charge. Furthermore, they may not cover the situation where one joint tenant murders the other.⁵⁹ A narrow statute is actually worse

Doherty v. Traxler, 66 So.2d 274 (Fla. 1953). And see *In re Quinn's Estate*, 243 Iowa 1266, 55 N.W.2d 172 (1953) (pending divorce action brought by decedent on ground of desertion).

⁵⁶ *In re Crater's Estate*, 372 Pa. 475, 93 A.2d 475 (1953). Cf. *In re Zanfino's Estate*, 100 A.2d 60 (Pa. 1953). The New York courts seem reluctant to hold that there was abandonment within the meaning of the statutory provision barring the spouse. *In re Mead's Estate*, 281 App. Div. 943, 119 N.Y.S.2d 579 (4th Dep't 1953); *In re Brown's Will*, 202 Misc. 820, 119 N.Y.S.2d 448 (Surr. Ct. 1952); cf. *In re Herbst's Estate*, 121 N.Y.S.2d 360 (Surr. Ct. 1953) (abandonment of child).

⁵⁷ *Bird v. Plunkett*, 139 Conn. 491, 95 A.2d 71 (1953), 27 Conn. B.J. 251. There is an extended discussion in *Clark, Crime Does Not Pay—Except for Perhaps Homicide: A Comment on Bird v. Plunkett*, 27 Conn. B.J. 170 (1953). Accord, *In re Daniels' Estate*, 260 P.2d 991 (Cal. App. 1953). See also *Strickland v. Wysowatcky*, 250 P.2d 199 (Colo. 1952); Notes, 16 Mod. L. Rev. 100 (1953); 7 Miami L.Q. 524 (1953).

⁵⁸ See *Henry v. Toney*, 64 So.2d 904 (Miss. 1953). Cf. *Wells v. Boatner*, 216 Miss. 108, 61 So.2d 662 (1952), where the slayer was removed as her husband's administratrix upon proof of conviction for murdering him.

⁵⁹ See Notes, 28 Notre Dame Law. 286 (1953); 27 Tulane L. Rev. 131 (1953);

than none at all, since it precludes application of the constructive trust theory in all uncovered situations, and in some of these it is as shocking to allow the slayer to take as in the cases enumerated by the statute.

II

WILLS

Capacity.—The Supreme Court of New Jersey upheld a letter of a twenty-year-old soldier in Korea as a soldier's will. The chief controversy was over the age requirement, which involved interrelation of successive state statutes. Technical construction principles, English decisions and declarative statute, a subsequent New Jersey enactment, and the policy of liberality in favor of military wills combined to support the holding that the general age requirement does not apply to these privileged wills.⁶⁰

Psychiatrists' answers to hypothetical questions played a prominent part in reversing the direction of a verdict in favor of wills contested for insane delusions.⁶¹ One is impressed, however, that ordinary medical testimony is relatively unimportant in most will contests because of the low standard of mentality which the law requires and of the fact that physical disability is not inconsistent with testamentary capacity.⁶²

Undue Influence, Fraud and Mistake.—Cases of the year tell us that influence secured through acts of kindness of a child toward the testator is not undue,⁶³ and that evidence of illicit relations between the testator and the beneficiary is not sufficient basis for a

[1953] Wis. L. Rev. 567; 6 Wyo. L. Rev. 266 (1952). See also 1952 Annual Surv. Am. L. 600, 28 N.Y.U.L. Rev. 663 (1953). In *Colton v. Wade*, 95 A.2d 840 (Del. Ch. 1953), the court refused to impose a trust when the survivor killed in self-defense.

⁶⁰ In re *Knight's Estate*, 11 N.J. 83, 93 A.2d 359 (1952); see 1952 Annual Surv. Am. L. 603, 28 N.Y.U.L. Rev. 666 (1953); Note, 28 N.Y.U.L. Rev. 761 (1953); Pa. Acts 1953, No. 27.

⁶¹ *Duncan v. Mayfield*, 209 Ga. 882, 76 S.E.2d 805 (1953); In re *Lockhart's Estate*, 258 S.W.2d 877 (Tex. Civ. App. 1953); cf. In re *Coddington's Will*, 281 App. Div. 143, 118 N.Y.S.2d 525 (3d Dep't 1952); In re *Heazle's Estate*, 257 P.2d 556 (Idaho 1953); see Note, 66 Harv. L. Rev. 1116 (1953). As to what may constitute an insane delusion, compare *Hornaday v. First Nat. Bank of Birmingham*, 65 So.2d 678 (Ala. 1953), with In re *Bauer's Estate*, 264 Wis. 556, 59 N.W.2d 481 (1953); and see In re *Elston's Estate*, 262 P.2d 148 (Okla. 1953) (unusual religious beliefs).

⁶² See In re *Jamison's Estate*, 256 P.2d 984 (Cal. 1953); *Heideman v. Kelsey*, 414 Ill. 453, 111 N.E.2d 538 (1953); In re *Davis' Estate*, 175 Kan. 107, 259 P.2d 211 (1953); *Shearrer v. Shearrer*, 259 S.W.2d 705 (Mo. App. 1953); In re *Coddington's Will*, 281 App. Div. 143, 118 N.Y.S.2d 525 (3d Dep't 1952); see also In re *Wilmott's Estate*, 66 So.2d 465 (Fla. 1953) (narcotics); cf. In re *Gore's Estate*, 260 P.2d 859 (Cal. App. 1953) (eye doctor who examined testator for glasses qualified to testify as to his sanity); In re *Thompson's Estate*, 261 P.2d 577 (Okla. 1953).

⁶³ *King v. Gibson*, 207 Okla. 251, 249 P.2d 84 (1952).

finding of undue influence.⁶⁴ On the other hand testimony that the second wife interfered with relations between testator and his children, plied him with liquor, and punctuated arguments by throwing dishes at him was held to sustain a verdict against the will.⁶⁵ It is becoming increasingly apparent that the traditional definitions of undue influence are unrealistic and almost worthless and that the issue is inappropriate for jury determination.⁶⁶ Seldom can direct evidence of the influence be offered and the vital matter is whether contestant has established sufficient factors to justify overthrow of the will. Of course a confidential relationship between the testator and the beneficiary, especially when coupled with activity of the latter in connection with the making of the will, is a factor favorable to contestant, but there is a great variety of viewpoint even in the cases of a single jurisdiction as to the consequences of such a showing.⁶⁷ Decisions this year portray the complications due to existence of an infinite number of fact patterns with reference to confidential relations and activity.⁶⁸ The same is true of other factors such as the testator's mental and physical condition, and the nature of his disposition. With so many possible permutations and combinations of circumstantial evidence, a strong case is made for the position that the issue of undue influence should be a matter for application of judicial discretion much as in case of the equitable defenses of laches or hardship.

It is commonly supposed that probate will be denied when the testator signs the wrong instrument, as on the occasion of execution of reciprocal wills. The profession in this country may be surprised at Professor Kennedy's able comment upon dominion decisions to the

⁶⁴ In re Lavelle's Estate, 248 P.2d 372 (Utah 1952); see also *Stockslager v. Hartle*, 92 A.2d 363 (Md. 1952) (suggestion of homosexual relations).

⁶⁵ *Lee v. Horrigan*, 140 Conn. 232, 98 A.2d 909 (1953).

⁶⁶ See 1952 Annual Surv. Am. L. 602, 28 N.Y.U.L. Rev. 665 (1953); Note, 7 Ark. L. Rev. 116 (1953); cf. *Floyd v. Dilaha*, 256 S.W.2d 48 (Ark. 1953) (testator's declarations).

⁶⁷ See 1945 Annual Surv. Am. L. 1038.

⁶⁸ In the following cases the showing was considered sufficient to defeat the will. *Clayburn v. Mathews*, 61 So.2d 83 (Ala. 1952) (sister); In re *Jamison's Estate*, 256 P.2d 984 (Cal. 1953) (son); *Cormier v. Myers*, 223 La. 259, 65 So.2d 345 (1953) (nurse); In re *Satterlee's Will*, 281 App. Div. 251, 119 N.Y.S.2d 309 (1st Dep't 1953) (attorney); *Anderson v. Davis*, 256 P.2d 1099 (Okla. 1953) (banker); In re *Martin's Estate*, 261 P.2d 603 (Okla. 1953) (relative); In re *Day's Estate*, 257 P.2d 609 (Ore. 1953) (confidante); *May v. Fidelity Trust Co.*, 375 Pa. 135, 99 A.2d 880 (1953) (daughter). The following cases refused to find undue influence on the basis of the showing. In re *Jennings' Estate*, 335 Mich. 241, 55 N.W.2d 812 (1952) (business associate); *Williams v. McCarroll*, 374 Pa. 281, 97 A.2d 14 (1953) (nephew); *Price v. Taliaferro*, 254 S.W.2d 157 (Tex. Civ. App. 1952) (brother). In all of these cases there was at least a claim of activity although in some it was inconsequential. In In re *Satterlee's Will*, supra, the lawyer-beneficiary drafted the will although he claimed that he took the property on secret trust for the physician of the testatrix.

contrary.⁶⁹ However, more than probate of the instrument is required to reach the result intended by the testator, since the will must also be reformed by changing the name of the beneficiary. This is a step for which there is English precedent, but in the United States it is practically forbidden ground in cases of this nature.

An Arkansas case⁷⁰ held that a will should be probated upon testimony of the scrivener that the things specified in the will were exactly as testatrix had told him, although she did not read the instrument prior to execution. The opinion does not rely upon a presumption of knowledge of contents, but rather upon proof of that knowledge and upon the philosophy that if the testator trusts the scrivener that court should not distrust him.

Execution.—In jurisdictions where publication of the will is required the witnesses must know from some acts or words of the testator that the instrument is his will. The New York Court of Appeals held that it was not enough that the testator told the witnesses that he was going on a trip and had some instructions if anything should happen, nor that testamentary words written in testator's hand were visible to the witnesses who testified they did not read them.⁷¹ While the holographic character of the instrument satisfied one purpose of publication, that the testator was cognizant of its testamentary nature, it was not deemed to justify letting down the bars as to the other reason for the requirement, that the witnesses should be able to vouch for the testator's realization of the testamentary nature of the instrument.

It is a paradox that the simple requirements for the execution of unattested holographic wills probably provoke more litigation than the provisions for formal attestation. In a California case⁷² the testator's name appeared near the beginning of the instrument: "Bonds belonging solely to Helene I. Bloch," followed by a list. The majority of the court regarded this as the signature of the testatrix. To say the least this is an extremely liberal decision and virtually adopts the philosophy of *Lemayne v. Stanley*⁷³ that the name of the

⁶⁹ 31 Can. B. Rev. 186, 444 (1953).

⁷⁰ Meek v. Bledsoe, 253 S.W.2d 369 (Ark. 1952); see also Morrow v. Person, 259 S.W.2d 665 (Tenn. 1953).

⁷¹ In re Pulvermacher's Will, 305 N.Y. 378, 113 N.E.2d 525 (1953); see also Kennard v. Evans, 65 So.2d 285 (Miss. 1953) (publication required when will is not signed in testator's presence). Cf. Rathke's Will, 124 N.Y.S.2d 218 (Surr. Ct. 1953) (publication sufficient).

⁷² In re Bloch's Estate, 39 Cal.2d 570, 248 P.2d 21 (1952), 41 Calif. L. Rev. 345 (1953), 4 Hastings L.J. 221 (1953). See 1952 Annual Surv. Am. L. 603, 28 N.Y.U.L. Rev. 666 (1953). For liberality under a statute requiring holographic wills to be signed at the end, see 1951 Annual Surv. Am. L. 691; 7 Ark. L. Rev. 159 (1953).

⁷³ 3 Lev. 1 (K.B. 1681).

testator appearing in the body of the instrument will be considered as his signature if he *might* have so regarded it.

The requirement of dating a holographic will is involved in three cases of the year. An incomplete date (month and year without the day) is insufficient,⁷⁴ although an erroneous date is not fatal.⁷⁵ Double-dating is permitted even if the dates are different.⁷⁶ Two dates, the first an insufficient one at the head of the instrument, the second a sufficient one at the place where the testator had apparently taken up the writing on a later occasion, did not invalidate in another case wherein the problem is treated as one of integration; the court found an intention to integrate the parts before and after the second date so that the latter would validate both parts.⁷⁷ The dating requirement gives trouble and it affords no guarantee of genuineness or testamentary intent as does the holographic feature. Dating may throw some light upon matters of interpretation and revocation in case the decedent left two undated, inconsistent instruments. However, there is almost as good an argument for a requirement of dating an attested will upon these grounds, but no common-law jurisdiction makes this requirement in the latter case. Indeed the mandate for dating holographic wills is closely parallel to a declaration that if one doesn't wear shoes he must wear a hat, with the inevitable inquiry into the problem of what is a hat.

There was a shocking Maine decision⁷⁸ invalidating a will attested by the executor to whom the will gave power to dispose of personal articles "as he in his sole discretion may deem best." The statute required that a will be attested by three "credible attesting witnesses, not beneficially interested," and there was no provision voiding legacies to witnesses, such as found in most jurisdictions. A Washington case⁷⁹ held that the executor of a nonintervention will was "competent" to act as attesting witness.

It is generally established that the requirement of "credible," as applied to attesting witnesses, means competent to give evidence as

⁷⁴ Succession of Sarrazin, 223 La. 286, 65 So.2d 602 (1953); see also *In re Moody's Estate*, 257 P.2d 709 (Cal. App. 1953).

⁷⁵ *In re Moody's Estate*, supra note 74.

⁷⁶ *Love v. Dawkins*, 22 La. 359, 62 So.2d 399 (1952).

⁷⁷ *In re Moody's Estate*, 257 P.2d 709 (Cal. App. 1953).

⁷⁸ *Appeal of Richburg*, 92 A.2d 724 (Me. 1952). In general see *Interested Parties as Witness to Wills*, American Bar Ass'n Probate and Trust Law Divisions, Real Property, Probate and Trust Law Section, Proceedings 38 (1953), also printed in 92 *Trusts & Estates* 786 (1953).

⁷⁹ *In re Wiltzius' Estate*, 253 P.2d 954 (Wash. 1953). See also *In re La Mont's Estate*, 39 Cal.2d 566, 248 P.2d 1 (1952) (involving failure to request the executor to sign "as a witness"); *Succession of Bush*, 67 So.2d 573 (La. 1953) (will named witness as attorney to probate will).

to the facts regarding the will. Hence an instruction that the attestors must be credible was error in a case where their credibility had been attacked at the trial.⁸⁰

Animus attestandi there must be, but the courts are loath to deny probate because of technical objection on this score. Thus, it is no objection that one who signed at testator's request may have thought he was signing as executor.⁸¹ Again, while it is the duty of attester to observe the testator's capacity as well as the formalities of execution, a will is not invalid because the attester did not notice the testator's mental condition.⁸²

Incorporation by Reference.—Where this doctrine is not recognized or where the prerequisites of its application are not met, can the unincorporated document be used to implement the testator's intent upon construction of the will? A New York surrogate's opinion declares that it cannot,⁸³ but a Michigan case holds that it may be used to determine what passes under the will.⁸⁴

The instrument in the latter case was duly executed in 1947 and read: "At my death after all bills are paid and the will is read; I hereby give the remainder of my assets to Irene O'Conner." There had been a 1946 will which gave bequests to the plaintiffs, who were a nephew and a niece and also the heirs at law, and to others. This was invalid because attested by only one witness. A prior decision held that the 1947 instrument did not sufficiently identify the first will to incorporate it by reference.⁸⁵

In the present action to construe the probated will the majority of the court found, from its terms and the surrounding circumstances including the 1946 instrument, that testator intended the 1947 instrument as a codicil to the earlier one and that O'Conner should receive the only remainder of the estate after the bequests in the invalid 1946 instrument. The intent that O'Conner should not receive the entire estate was given effect despite the fact that the presumptions or rules of construction against partial intestacy and in favor of total validity would point to a different result. The opinion is sound in declaring

⁸⁰ *Wallace v. Harrison*, 65 So.2d 456 (Miss. 1953). Cf. *Sanders v. Abernathy*, 253 S.W.2d 331 (Ark. 1952) (a "credible witness" to prove a holographic will means one who, being competent to give evidence, is worthy of belief).

⁸¹ *In re La Mont's Estate*, 39 Cal.2d 566, 248 P.2d 1 (1952).

⁸² *In re Mitchell's Estate*, 41 Wash.2d 368, 249 P.2d 385 (1952).

⁸³ *In re Whyte's Will*, 123 N.Y.S.2d 846 (Surr. Ct. 1953).

⁸⁴ *Shattuck v. Fagan*, 337 Mich. 83, 59 N.W.2d 96 (1953).

⁸⁵ *In re Shattuck's Estate*, 324 Mich. 568, 37 N.W.2d 555 (1949). Cf. *In re Sciutti's Estate*, 371 Pa. 536, 92 A.2d 188 (1952) (letter referring to an unsigned will denied probate because it was not testamentary, thus avoiding the question as to whether the requirements of incorporation by reference were met).

that rules of construction should not be applied in competition with testator's intent discovered from permissible sources. However, in reaching the result that O'Conner should receive the property not disposed of in the invalid instrument but that the property which was covered by the 1946 will should pass under the intestate laws, the majority is not only inconsistent with its prior decision but also violates fundamental principles of construction. Possibly the 1946 instrument can be regarded as a declaration which might be used to explain an equivocation in the probated will, but the words "the remainder" in this will do not amount to an equivocation as understood in the construction process.⁸⁶ The majority decision is to the effect that if a will gave "something to A" and "the rest to B," testator's declarations as to what A should get, while inadmissible to give anything to A, are admissible to show what B should receive. The obscure language of the majority opinion does not cover up the proposition that it accepts this line of reasoning.

The minority is not persuaded that the words "and the will is read" were intended to refer to the 1946 will. This is a tenable finding, and in this event it is reasonable to apply the presumptions against partial intestacy and total invalidity in reaching the construction that these ambiguous words should be deemed to refer to the reading of the 1947 will, with the result that the entire net estate would pass to O'Conner. Possibly, however, the earlier decision may be *res judicata*, or at least law of the case, on the proposition that these words referred to the 1946 instrument.

Both majority and minority opinions reject the trial court's decree which found with the majority that testator did not intend O'Conner to receive the entire net estate, but declared that the bequest of "the remainder" must fail for indefiniteness since the court cannot refer to an unincorporated paper to fix the amount of the residue. This is also a tenable result.⁸⁷

There is still another possible solution which may be reached after finding that the testator did not intend O'Conner to receive his entire net estate. It could have been held that since the bequests to the others according to the 1946 instrument must fail, they must be treated as void with the result that they swell the residue, thus giving everything to O'Conner. It thus appears that, while there are three defensible possibilities, the majority of the Michigan Supreme Court adopts a viewpoint which cannot be supported. It is cracker-barrel justice giving each side part of the estate, but it is a step in the direc-

⁸⁶ 9 Wigmore, Evidence § 2472 n.2 (3d ed. 1940); see *In re Graves' Estate*, 116 N.Y.S.2d 231 (Surr. Ct. 1952) (no beneficiary named).

⁸⁷ *Hastings v. Bridge*, 86 N.H. 247, 166 Atl. 273 (1933).

tion of disregarding the safeguards of due execution of wills through a self-contradictory construction technique.

Connecticut, one of the few states which has refused to recognize the doctrine of incorporation by reference, has passed legislation permitting reference to an existing trust agreement signed and acknowledged by testator before two witnesses.⁸⁸ Of course there is also the possibility of resort to the doctrine of reference to nontestamentary act, a theory which becomes vital when the trust is amendable by its terms, and especially when it has been amended after the execution of the will.⁸⁹ The effect of this legislation upon references to amendable trusts is bound to give rise to litigation.

Testamentary Character.—In a New York case⁹⁰ a partnership agreement between the decedent and another providing for disposition of the interest upon death of the partners was admitted to probate. Attached to the agreement was a certificate of three witnesses who certified to execution in much the same manner as an ordinary attestation clause, except that instead of the reference to publication as a will it recited that the parties acknowledged that the agreements were exchanged and delivered by the parties. The court found that the decedent knew the contents of the instrument, intended it as his will, and that it was executed in conformity with the wills statute. Nothing is said specifically about publication which is required for wills in New York. Here the document was apparently in part a contract and in part a will.

The case is suggestive of the problem of the draftsman, who prepares a trust agreement, deed, contract or other instrument intended to take effect as an inter vivos transaction, but who wishes to sustain the document as a will if the terms are held to be testamentary. Naturally it is not desirable to attach an ordinary attestation clause since this is an indication of testamentary character and tends to defeat the use of the instrument as one of the preferred nontestamentary category. Even the type of certificate applied in the New York case may be undesirable or marginal. Probably the matter of testamentary intent is a hurdle which is overcome if the maker has read the instrument and understands its purport, but where publication is required for a will there is greater difficulty. In such jurisdictions any

⁸⁸ Conn. Rev. Gen. Stat. § 2203(c) (Supp. 1953).

⁸⁹ See 27 Conn. B.J. 248 (1953), 37 Minn. L. Rev. 153 (1953). As to the close relationship between incorporation and integration in case of a holographic will see *In re McNamara's Estate*, 260 P.2d 182 (Cal. App. 1953).

⁹⁰ *In re Dash's Will*, 120 N.Y.S.2d 621 (Surr. Ct. 1953); cf. *In re Reab's Estate*, 348 Ill. App. 223, 108 N.E.2d 798 (1952) (agreement to pay for care denied probate); *Appeal of Thompson*, 100 A.2d 69 (Pa. 1953) (parol evidence admissible to show testamentary character).

attempt to comply with the wills statute may impair the chance of sustaining the transaction as one of inter vivos character. The safest way to try to meet the publication requirement without damning ostentation as to that formality would be to select attestors who are learned in the law and have studied the instrument. One cannot be blamed for blowing hot and cold if he can, but this technique can scarcely be recommended for general use. In most cases it would be better to employ the device of a will by unequivocal manifestations, when it is dubious whether the result can be effected by some other means.

Conditions and Conditional Wills.—A handful of interesting cases involved the validity or performance of conditions, and the effect of nonperformance. In a Tennessee case the will provided that, if the beneficiary was adopted by any person not a member of testator's family and her name changed, the trust for her benefit should terminate and the funds paid to others. The beneficiary was the daughter of testator's deceased son, and upon her mother's remarriage was adopted by the mother's second husband. It was held that the condition was valid, and that the trust terminated in spite of the fact that the infant beneficiary did not and could not consent to the adoption.⁹¹ A New York court held that a condition that any descendant who should marry one not of Jewish faith and blood should take no share in testator's estate was valid, and should be applied to prevent his great granddaughter, upon marriage to a non-Jew, from taking under a power of appointment given by testator's will to her father.⁹²

The New Jersey court decided that a bequest to a sister "provided she spends the rest of her days" in a certain Presbyterian home was upon a condition subsequent, and that since performance was improbable because the legatee was sixty-three and could not enter the home for five and one-half years if at all, she was entitled to the legacy immediately.⁹³ A California case held that a residuary devise to one, providing a trial arrangement for the testatrix to live with the devisee was successful, was upon condition precedent; hence when the testatrix died before coming to live with the devisee the latter was not entitled to the property. Of course a condition of this nature cannot be subsequent to the operation of the will and the only problem is whether such provisions are conditions or mere statements of inducement.⁹⁴

⁹¹ *National Bank of Commerce v. Greenberg*, 258 S.W.2d 765 (Tenn. 1953); cf. *Squibb, The End of the Name and Arms Clause*, 69 L.Q. Rev. 219 (1953).

⁹² *In re Rosenthal's Estate*, 204 Misc. 432, 123 N.Y.S.2d 326 (Surr. Ct. 1953), rev'd, N.Y.L.J. No. 47, p. 1, col. 1 (App. Div., 1st Dep't March 11, 1954).

⁹³ *Tizard v. Eldredge*, 25 N.J. Super. 477, 96 A.2d 689 (App. Div. 1953).

⁹⁴ *In re Catlett's Estate*, 117 Cal. App.2d 315, 255 P.2d 464 (1953). Cf. *Farmers*

The question of whether certain language is intended to make the entire will conditional, or is merely an explanation of why the will was made at that time is frequently litigated. The courts prefer the latter construction if it can be reached upon a reasonable basis in the light of the surrounding circumstances. This result obtained in a California case where the disposition was prefaced by the words "in case *Davie Jones* gets me out in the South Pacific."⁹⁵ A like conclusion was reached in an Illinois decision where a codicil contained the language "in case my wife . . . and myself should both be killed or die within a short time of each other."⁹⁶ While the testator's wife died almost four years before he did, it was held that the codicil should be probated since its provisions indicated a well-considered plan rather than an intention that the will should operate only upon the contingency mentioned.

Contracts to Devise.—Some decisions of the year indicate legislative and judicial attitudes of disfavor for agreements to devise or bequeath. In other words there may be more handicaps put in the way of recovery than in case of contracts generally. The judicial attitude is articulated in a New York decision⁹⁷ wherein specific performance of an oral Florida contract not to change the will of a New York resident was sought. The contract was assumed to be valid under Florida law. Section 31(7) of the New York Personal Property Law declared promises to bequeath void unless it or some memorandum thereof be in writing. In denying relief the court stresses the points that the power of testation is not inherent, that written and attested wills are required by New York law except in case of persons in the military service, and that while wills executed in accordance with the law of the testator's domicile or the place of execution are valid, this is limited by the local statute to wills in writing subscribed by the testator. Accordingly it is concluded that the enforcement of oral contracts to make or refrain from altering a will is inconsistent with and imperils the New York policy relating to testamentary dispositions. Cases from other states disfavor such agreements by strict application of the Statute of Frauds,⁹⁸ of the

State Bank & Trust Co. v. Mangold, 415 Ill. 602, 114 N.E.2d 797 (1953) (condition "providing they do that which is right" void for uncertainty).

⁹⁵ In re Taylor's Estate, 259 P.2d 1014, 1015 (Cal. App. 1953).

⁹⁶ In re Trager's Estate, 413 Ill. 364, 369, 108 N.E.2d 908, 911 (1952). See also *Anthony v. Harris*, 100 A.2d 229 (Del. Ch. 1953).

⁹⁷ *Rubin v. Irving Trust Co.*, 305 N.Y. 288, 113 N.E.2d 424 (1953).

⁹⁸ *Sherman v. Johnson*, 159 Ohio St. 209, 112 N.E.2d 326 (1953) (letter by deceased wife that she and her husband considered claimant as her daughter and wanted her to have all their property is not sufficient memorandum of a promise to devise and bequeath); *Gray v. Marino*, 76 S.E.2d 585 (W. Va. 1953) (holographic will not referring to agreement is not sufficient memorandum). Cf. *In re Cox's Estate*, 260 P.2d

dead man's statute,⁹⁹ or of equitable principles denying relief on a discretionary basis.¹⁰⁰ However, several cases from other jurisdictions indicated no similar¹⁰¹ discountenance of actions upon contracts to devise.

The Supreme Court of Illinois held that a bequest of \$50,000 to testator's divorced wife in satisfaction of her dower rights preserved in the divorce decree was not subject to the state inheritance tax since she took as a creditor and not under the laws of succession.¹⁰² The possibility that this doctrine should be extended to all contracts to devise is indeed interesting. Would the parties to reciprocal agreement to will their property to each other be regarded as creditors for this purpose? It is forecast that they would not be so considered, or, if by chance they were, that the Legislature would soon change the result.

Revocation.—A Connecticut decision¹⁰³ is clearly orthodox in its holding that "cancelling" in the revocation statute refers to physical acts to the instrument, and is not used in the general sense of abrogating or setting aside; hence a separate written declaration of revocation signed by an insufficient number of witnesses has no effect upon the prior will. Where a testator crossed out and changed the will in pencil preparatory to the execution of a new will it was held that there was no revocation because of absence of intent.¹⁰⁴ Both an act designated by statute and an intent to revoke are necessary for this type of revocation.

Four cases of the year applied the doctrine of dependent relative revocation to save the original devises and bequests when there had

909 (N.M. 1953) (contract to devise in return for services does not come within statute requiring a writing for a contract to adopt or to treat claimant as an heir).

⁹⁹ *Vehn v. Bergman*, 57 N.M. 351, 258 P.2d 734 (1953); see also *Burton v. Keaton*, 60 So.2d 770 (Fla. 1952).

¹⁰⁰ *Zuelch v. Droege*, 56 N.W.2d 651 (Minn. 1953). Colo. Stat. Ann. c. 176, § 70(1) (Supp. 1953) provides that execution of two wills at one time is not evidence that they were made in consideration of each other.

¹⁰¹ *First Nat. Bank v. De Loach*, 87 Ga. App. 639, 74 S.E.2d 740 (1953); *Foley v. Elliot Community Hospital*, 96 A.2d 735 (N.H. 1953); *Bennington v. McClintick*, 253 S.W.2d 132 (Mo. 1952); *Minogue v. Lipman*, 25 N.J. Super. 376, 96 A.2d 426 (Ch. Div. 1953); *Wallace v. Hill*, 207 Okla. 319, 249 P.2d 452 (1952). See also *Beach v. Cobble*, 260 S.W.2d 212 (Tenn. App. 1953) (joint instrument bequeathing property "which we or either of us own at the time of death of the last survivor" upheld as against the contention that it postpones administration until the survivor's death); cf. 1950 Annual Surv. Am. L. 687; 1951 Annual Surv. Am. L. 694.

¹⁰² *In re Greiner's Estate*, 412 Ill. 591, 107 N.E.2d 836 (1952); cf. *In re Simonson's Estate*, 125 N.Y.S.2d 46 (Surr. Ct. 1953).

¹⁰³ *Harchuck v. Campana*, 139 Conn. 549, 95 A.2d 566 (1953). See also *In re Kehr's Estate*, 373 Pa. 473, 95 A.2d 647 (1953) (attempt to nullify carbon copy), noted at length by Professor Hutton in 58 Dick. L. Rev. 25 (1953).

¹⁰⁴ *First Nat. Bank v. Briggs*, 108 N.E.2d 548 (Mass. 1952).

been attempts to set up substitute dispositions which failed for want of due execution. Two of these cases applied the doctrine mechanically and regardless of the fact that the testator might well have preferred revocation if the changes could not be given effect.¹⁰⁵ The other decisions employed the doctrine with discrimination upon a finding that testator would have preferred the original provisions to a revocation thereof.¹⁰⁶

Ademption.—In an Iowa case¹⁰⁷ a joint owner of land devised it in case she survived the other joint tenant. Later both joint tenants contracted to sell the land; still later the joint tenant died. Upon the death of the deviser it was held that the contract destroyed the joint tenancy, effected an equitable conversion, and worked an ademption of the devise so that the unpaid portion of the contract price went to the residuary legatee rather than to the devisee. In Virginia it was held that the court-approved sale of condemned land by the guardian of a testator who had become incompetent did not prevent the proceeds from passing as real property under the will.¹⁰⁸ The committee's use of the testator's five United States savings bonds did not defeat legacies to each of testator's five grandchildren of "a" bond of the series and amount which he held at the time of execution; the general legacy construction was resorted to, although no one can doubt that the testator intended to bequeath the bonds which he had owned.¹⁰⁹ The demonstrative legacy device saved legacies of stated amounts described as being on deposit or in trust at certain banks when the accounts were withdrawn or depleted by the testator after execution of his will.¹¹⁰

The Oklahoma case of *In re Barry's Estate*¹¹¹ involved the specific bequest of an automobile which was seriously damaged in a collision resulting in the death of testator eight hours later. The in-

¹⁰⁵ *Stevens v. Royalls*, 77 S.E.2d 198 (S.C. 1953) (cancellation of substantial devise by attempted substitution of a \$200 legacy and devise of the land to another); *Woodson v. Woodson*, 255 S.W.2d 771 (Mo. 1953) (legacies substantially reduced).

¹⁰⁶ *Putnam v. Neubrand*, 109 N.E.2d 123 (Mass. 1952) (substitution of pages; revocation called conditional; comparison of provisions); *La Croix v. Senecal*, 140 Conn. 311, 99 A.2d 115 (1953) (express revocation by codicil; new provisions in part failed because of interest of witnesses; no material change by codicil).

¹⁰⁷ *In re Sprague's Estate*, 57 N.W.2d 212 (1953), 38 Iowa L. Rev. 587.

¹⁰⁸ *Bryson v. Turnbull*, 194 Va. 528, 74 S.E.2d 180 (1953), 41 Geo. L.J. 4. See notes 115, 123, 124 *infra*.

¹⁰⁹ *Application of Osterhoudt*, 203 Misc. 733, 118 N.Y.S.2d 879 (Surr. Ct. 1953); see also *Matter of Fitch*, 281 App. Div. 65, 118 N.Y.S.2d 234 (3d Dep't 1952), 28 N.Y.U.L. Rev. 1194 (1953).

¹¹⁰ *In re Kuhr's Estate*, 120 N.Y.S.2d 729 (Surr. Ct. 1950); *In re Linetzky's Estate*, 120 N.Y.S.2d 730 (Surr. Ct. 1953).

¹¹¹ 252 P.2d 437 (Okla. 1953), 53 Col. L. Rev. 885, 38 Corn. L.Q. 630, 31 N.C.L. Rev. 517, 25 Rocky Mt. L. Rev. 380.

surer elected to take the car and paid the executor its value prior to the accident. It was held that the legatee was entitled to the value of the car after the accident but that the remainder of the insurance money became part of the general estate. The holding seems orthodox regardless of whether the case falls in the category of partial ademption or is decided upon the basis that the insurance policy is a chose in action passing to the executor; the insurer's election to take the car can scarcely be held to work a total ademption since that event was subsequent to testator's death. The case cannot be distinguished in principle from one¹¹² in Kansas where the will left all testator's realty to his children and the residue to his second wife; a tornado destroyed some of the buildings of the testator who died fifteen hours later as a result of the storm. It was held that in accordance with the testator's intent and on general equitable principles the proceeds of insurance on the buildings represented the realty and passed to the children under the will. Although the fact that the widow had waived homestead and consented to the will in accordance with a premarital agreement may support the equities of the decision, it did not justify the court in rewriting the will or in departing from established principles.

Increase and Interest.—In a New Jersey case¹¹³ the will created a trust in the sum of \$250,000 with income to the widow for life and on her death \$150,000 to the widow's appointees and the remaining \$100,000 to testator's residuary estate. It was held that accrued income was payable to the widow's appointees regardless of whether the legacy was denominated specific or demonstrative. The will in a New York case¹¹⁴ provided for several legacies of United States Steel stock; at the time of execution he owned more than enough of the stock to satisfy the legacies but he subsequently sold all of the stock; still later the stock was split up three for one. It was held that the legacies, being general, were not adeemed and that the increased number of shares resulting from the split-up passed to the legatees. Although it has been thought that the latter holding is permissible only in case of a specific legacy, the decision seems correct since the added shares do not pass as increase but rather as the substance of the thing bequeathed, regardless of whether the legacy is specific or general.¹¹⁵

¹¹² In re Elliott's Estate, 174 Kan. 252, 255 P.2d 645 (1953).

¹¹³ Busch v. Plews, 12 N.J. 352, 96 A.2d 761 (1953). Fla. Gen. Laws 1953, c. 28025, which codifies the law as to interest and income, would dictate the same holding.

¹¹⁴ Matter of Fitch, 281 App. Div. 65, 118 N.Y.S.2d 234 (3d Dep't 1952), 28 N.Y.U.L. Rev. 1194 (1953); see also In re Katz's will, 120 N.Y.S.2d 704 (Surr. Ct. 1953) (specific legacies of stock).

¹¹⁵ See 1949 Annual Surv. Am. L. 841-42.

An Ohio decision awarded interest at 6 per cent (the legal rate) upon pecuniary legacies from nine months after the appointment of the executor (the time for collection of assets and payment of claims), although the estate had been delayed in settlement due to a will contest.¹¹⁶ In a New York case¹¹⁷ the delay was caused by litigation between the legatee of contingent legacies and his assignee; interest was awarded to the latter at the rate of 3 per cent, the earned rate of income for the estate.

Lapse.—In a Pennsylvania case¹¹⁸ the will left the residue to two corporations, one of which had been dissolved by decree prior to the testator's death. It was held that there was no lapse, since before distribution the decree of dissolution had been vacated. The Illinois court avoided the result of lapse by holding that a devise to X and his wife, Y, was a class gift so that Y took the entire interest when X had predeceased the testator; the court makes intelligent use of evidence of the surrounding circumstances indicating that the testator was class minded.¹¹⁹ The statute to prevent lapse was held not to apply to a legacy to one brought up with testator and whom he regarded as his sister, which facts were recited in the will.¹²⁰ Of course the antilapse statute does not apply to a legacy to a brother "if he shall survive me."¹²¹ Indeed this phrase is the standard one to indicate an intention that the statute should not apply.

A lapsed specific devise passed under a clause giving "all the rest, residue and remainder of my estate," as against the contention that the latter created a particular fund which did not include prior devises and bequests; a power of sale over all property "not otherwise disposed of" did not impair the effect of the residuary clause in this regard.¹²²

Construction.—Two decisions pierced the corporate veil for the purpose of permitting the person named in the will to reach property,

¹¹⁶ *In re Rothschild's Estate*, 114 N.E.2d 143 (Ohio Prob. 1948). As to the time at which interest begins, see *Branch Banking & Trust Co. v. Whitfield*, 76 S.E.2d 334 (N.C. 1953), also interesting on payment to minor legatees.

¹¹⁷ *In re Fromberg's Will*, 281 App. Div. 1, 117 N.Y.S.2d 40 (1st Dep't 1952). This opinion refers to a subsequent statute providing for 3 per cent interest unless the delay in payment was unreasonable. See also *Levy v. Griffiths*, 282 App. Div. 770, 123 N.Y.S.2d 533 (2d Dep't 1953).

¹¹⁸ *In re Higbee's Estate*, 372 Pa. 233, 93 A.2d 467 (1953). See notes 124, 125 *infra*.

¹¹⁹ *Krog v. Haska*, 413 Ill. 290, 109 N.E.2d 213 (1952). Accord, *In re Long's Estate*, 121 N.Y.S.2d 183 (Surr. Ct. 1953) (brothers). But see *In re Spiegel's Estate*, 121 N.Y.S.2d 355 (Surr. Ct. 1953) (stepchildren).

¹²⁰ *In re Park's Will*, 202 Misc. 117, 116 N.Y.S.2d 680 (Surr. Ct. 1951).

¹²¹ *In re Conay's Estate*, 121 N.Y.S.2d 486, 487 (Surr. Ct. 1953). See Note, Problems under the Anti-Lapse Statute of Colorado, 25 Rocky Mt. L. Rev. 334 (1953).

¹²² *Collins v. Patton*, 113 N.E.2d 100 (Ohio App. 1952).

title to which was in a corporation totally owned by the testator. The first involved a devise of land which testator inaccurately informed the draftman was owned by the testator.¹²³ In the second¹²⁴ the will gave the brother of the testator the right to purchase all his stock in a certain corporation at book value. Thereafter, the stock was transferred for tax purposes to a second corporation in which the testator owned all the stock and still later the second corporation was merged with a third to form a fourth, also owned by the testator. It was held that testator was at the time of his death the owner of the stock within the meaning of the will, and that the principle of ademption has no application since there was no extinction of the original stock.

In a California case¹²⁵ the devise of the entire estate lapsed because of the predecease of the legatee, and nephews of the testator claimed a gift by implication because of words in the will excluding testator's grandchildren; but the court declared that the estate passed to the latter as intestate property. This result seems sound since the exclusion clause is palpably intended to exclude the grandchildren merely as against the legatee. Surely there is nothing to indicate an intention to benefit collateral relatives who are not even mentioned in the will. However, the Tennessee court was willing to supply the words "all my property" in the will's sole bequest to a sister for life, then to her children, when the will made no mention of what property was given.¹²⁶ In two cases the will provided for a disposition if a life beneficiary predeceased the testator, and the court implied a disposition to the same effect when the life beneficiary survived.¹²⁷

Because of the interesting situation present and the horrendous result reached, the Michigan case of *Shattuck v. Fagan*¹²⁸ discussed above, is the construction case of the year. On the brighter side is a thoughtful discussion by Chief Justice Schaefer of the Supreme

¹²³ In re Wyler's Estate, 202 Misc. 1035, 118 N.Y.S.2d 182 (Surr. Ct. 1952).

¹²⁴ In re Armour's Estate, 11 N.J. 257, 94 A.2d 286 (1953). The opinion goes into great detail as to the admissibility of extrinsic evidence, particularly declarations of the testator, as to the meaning of the testamentary formula for price determination.

¹²⁵ In re Dunn's Estate, 260 P.2d 964 (Cal. App. 1953); cf. In re Graves' Estate, 116 N.Y.S.2d 231 (Surr. Ct. 1952) (cannot supply recipient's name by declarations).

¹²⁶ Greer v. Anderson, 259 S.W.2d 550 (Tenn. App. 1953); cf. In re Brown's Estate, 122 N.Y.S.2d 640 (Surr. Ct. 1953).

¹²⁷ Hackensack Trust Co. v. Bogert, 24 N.J. Super. 1, 93 A.2d 402 (App. Div. 1952); In re Haber's Will, 281 App. Div. 383, 119 N.Y.S.2d 843 (4th Dep't 1953); see also In re White's Estate, 113 Cal. App.2d 890, 249 P.2d 329 (1952) (trust remainder for education of grandchildren; due to longevity of life tenant, they had completed their educations before latter's death).

¹²⁸ 337 Mich. 83, 59 N.W.2d 96 (1953).

Court of Illinois on the process of construction, including extrinsic aids in interpretation, the use of precedents and the functions of canons of construction.¹²⁹ The only pity of it is that his practical, honest and learned treatment cannot be made a challenge to the courts which refuse to apply the same reasonable approach and to the others who perpetuate the absolutism of Coke and his successors in viewpoint. The matter should be kept alive until the differences in attitude are thoroughly debated and the bench and bar see light in an area where there has too often been ignorance, indifference and confusion. Nothing is more important than construction technique for a profession that deals so much with words.¹³⁰ It is vital too to recognize differences in the process of construction of wills, of contracts and of statutes.¹³¹

A provoking California case holds that proceedings involving construction of a will by the court should not prejudice the determination of testator's intention by a jury, to which there was a statutory right.¹³² The decision is sound in the assumption that interpretation involves questions of fact. Furthermore it suggests that there may be a constitutional right to trial by jury if there is controversy over the meaning of the will in a legal action such as one to recover possession of land.¹³³ The matter is seldom raised, but, inasmuch as it is the testator's intention rather than the legal meaning of his words that is being sought, there is every reason why the question should be for the jury in a jury case despite a different rule in the construction of bilateral instruments.

III

PROBATE AND ADMINISTRATION

Probate and Contest.—An action for damages was brought by one sister against another for fraudulent representations alleged to have resulted in a codicil which disinherited plaintiff, who had shared testator's estate under an earlier will. The action was properly dismissed since the plaintiff had a remedy by contesting the codicil.¹³⁴ A

¹²⁹ Intent of the Testator, American Bar Ass'n, Probate and Trust Law Divisions, Real Property, Probate and Trust Law Section, Proceedings 5 (1953), also printed in 92 Trusts and Estates 716 (1953). Significantly, the excellent construction opinions cited supra at notes 96 and 119, were by the court of which Chief Justice Schaefer is a member.

¹³⁰ See 1950 Annual Surv. Am. L. 693-94; 1951 Annual Surv. Am. L. 699-703; 1952 Annual Surv. Am. L. 609-11, 28 N.Y.U.L. Rev. 672-74 (1953).

¹³¹ Cf. Thornton, Intent of the Draftsman as a Device to Construe Written Instruments, 5 Ala. L. Rev. 36 (1953).

¹³² Mallarino v. Superior Court, 115 Cal. App.2d 781, 252 P.2d 993 (1953).

¹³³ Compare Page, Wills §§ 916, 1610, 1616 (3d ed. 1941), with 9 Wigmore, Evidence § 2556 (3d ed. 1940).

¹³⁴ Mangold v. Neuman, 371 Pa. 496, 91 A.2d 904 (1952), 101 U. of Pa. L. Rev. 893 (1953).

federal court held that it had no jurisdiction to entertain a damage suit based on a charge that defendant suppressed a will in plaintiffs' favor and took possession of the estate under an earlier will.¹³⁵ In the latter case the court stressed the fact that plaintiffs still had remedy by annulment of the probate action in the state court.¹³⁶

In a Texas case¹³⁷ all of the interested parties compromised their differences and the court entered judgment giving effect to the agreement, whereupon the executors appealed. It was held that the compromise dispensed with the necessity of probating the will.

The North Dakota court¹³⁸ held that an attorney for proponent, acting under general authority, was not authorized to dismiss the petition for probate with prejudice, while a New York court refused to permit an executor to withdraw his petition although he would not be compelled to proceed further with the probate.¹³⁹ In a Wisconsin case an attorney had drafted prior wills for testator. After the attorney's death it was held that his executor must deliver the wills to the executor of the testator as the property of the latter.¹⁴⁰

The United States Court of Appeals for the Sixth Circuit held that under Kentucky law a grantee of a devisee would be protected although the will was later set aside for forgery.¹⁴¹ The statutes cited have little bearing on the matter but the result is supportable because of the very nature of probate decrees.

Foreign Wills and Ancillary Probate.—A reasonable decision in Arkansas admitted a 1914 will executed in Illinois upon the deposition of one attester, proof of handwriting of the second, and the testimony of handwriting experts based upon comparison with other documents, some of which fell within the ancient document rule.¹⁴² The Montana court held that due process of law had been violated by the local *ex parte* probate of a will of a resident testator based upon a previous

¹³⁵ *McGregor v. McGregor*, 201 F.2d 528 (10th Cir. 1953).

¹³⁶ *Cf. Lanham v. Howell*, 203 F.2d 361 (5th Cir. 1953) (action to annul will in federal court dismissed). See also *Rice v. Sayers*, 198 F.2d 724 (10th Cir. 1952). Even where the state procedure for contest is such as to permit a contest in federal court if there is diversity of citizenship, the state law must be observed. *Strachan v. Nisbet*, 202 F.2d 216 (7th Cir. 1953) (parties); *Sieland v. Hamel*, 14 F.R.D. 20 (E.D. Mo. 1953) (summary judgment).

¹³⁷ *Robbins v. Simmons' Estate*, 252 S.W.2d 970 (Tex. Civ. App. 1952); see also *De Caro v. De Caro*, 13 N.J. 36, 97 A.2d 658 (1953) (granting specific performance of compromise agreement).

¹³⁸ *Mongeon v. Burkebile*, 55 N.W.2d 445 (N.D. 1952).

¹³⁹ *In re Piekarski's Will*, 121 N.Y.S.2d 190 (Surr. Ct. 1953).

¹⁴⁰ *In re Landaver's Estate*, 264 Wis. 456, 59 N.W.2d 676 (1953).

¹⁴¹ *Chastain v. McKinney*, 203 F.2d 712 (6th Cir. 1953).

¹⁴² *In re Altheimer's Estate*, 256 S.W.2d 719 (Ark. 1953). As to choice of law see *Rabel, The Form of Wills*, 6 Vand. L. Rev. 533 (1953).

California ancillary probate.¹⁴³ California's vigilance in seeing that no opportunity for local ancillary proceedings is overlooked is illustrated by a case¹⁴⁴ in which the public administrator's petition for probate and administration was granted because of the presence of bonds, a bank account and a fur coat; trifling debts were shown but these would undoubtedly have been satisfied by the foreign executors whose objections to the California proceedings are based on good sense if not on the technical rules of law. In an Alabama case¹⁴⁵ there was apparently some reason for ancillary administration and letters were granted to the nonresident executors without local probate. This decision, while it involves a different proposition from that in the California case, shows a far healthier attitude. Altogether the cases of the year indicate the desirability of adopting the Uniform Ancillary Administration and Probate Acts which would eliminate many ancillary proceedings and simplify the procedure in others.¹⁴⁶

Simultaneous Death.—Utah and West Virginia¹⁴⁷ have enacted the Uniform Simultaneous Death Act, bringing the total adoptions to forty-one. The key provision of this act is that if title depends upon priority of death and there is no sufficient evidence of that fact, the property of each person shall be disposed of as if he had survived.¹⁴⁸ By means of this enactment there can be an equitable solution in cases where otherwise there would be an impasse or an arbitrary determination upon the basis of burden of the proof. In Ohio, legislation going beyond the Uniform Act and providing that when the spouse, heir or legatee died within three days, or within thirty days as the result of a common accident, the estate of the first decedent shall pass as if he had survived, was applied in a case where the husband and wife were struck in a crossing accident and he died within a few minutes and she three weeks later.¹⁴⁹ In another Ohio deci-

¹⁴³ In re Smith's Estate, 255 P.2d 687 (Mont. 1953).

¹⁴⁴ In re Glassford's Estate, 114 Cal. App.2d 181, 249 P.2d 908 (1952); cf. Stimson, Conflict of Laws and the Administration of Decedents' Real Estate, 6 Vand. L. Rev. 545 (1953).

¹⁴⁵ Fields v. Baker, 67 So.2d 10 (Ala. 1953); see also In re Armijo's Will, 57 N.M. 649, 261 P.2d 833 (1953).

¹⁴⁶ 1950 Annual Surv. Am. L. 677.

¹⁴⁷ Utah Laws 1953, p. 227; W. Va. Code Ann. c. 42, art. 5 (Supp. 1953).

¹⁴⁸ See excellent Note, 38 Iowa L. Rev. 750 (1953). Several jurisdictions have departed from the Uniform Act in some particulars. As to the Texas divergencies see Note, 5 Baylor L. Rev. 105 (1952). As to the meaning of "sufficient evidence" see In re Adams' Estate, 348 Ill. App. 115, 108 N.E.2d 32 (1952).

¹⁴⁹ In re Gilger's Estate, 109 N.E.2d 333 (Ohio Prob. 1952). Ohio Sen. Bill No. 40 (1953) makes the section inapplicable if different provisions are made by will; the Uniform Act is to the same effect.

sion it was held that the time of death of a Nazi victim could be determined in proceedings under the Declaratory Judgment Act as well as under the Presumed Decedents Act; the importance of the decision lies in the fact that, under the latter, death would not be presumed until a date subsequent to the death of the testator.¹⁵⁰

Claims.—Maryland joins the growing list of jurisdictions which hold that the nonclaim statute applies to the state's claim—in this case one for refund of old age assistance payments.¹⁵¹ Cases applying the nonclaim bar to claims for negligent injuries,¹⁵² conversion¹⁵³ and malicious prosecution¹⁵⁴ illustrate the tendency to extend the operation of these statutes in the interest of speedy settlement of decedents' estates.

Many, perhaps most, states have no express or implied exceptions on the basis of the circumstances causing delay in the assertion of the claim. One would regret the application of the bar in a Massachusetts case¹⁵⁵ wherein the first action was commenced within six months and hence dismissed as being brought too soon under the state law, but the administrator's objection on that ground was not made until after one year and it was then normally too late to commence another action. By a process of statutory construction the court was able to hold that the claimant could still maintain an equitable action, without resort to a statutory exception permitting late claims upon principles of "justice and equity" when the claimant was not guilty of "culpable neglect." Doubtless the court would have held the case within this exception if resort to its provisions had been necessary.¹⁵⁶

As a whole statutory exceptions to the nonclaim statutes are strictly and narrowly construed. "Good cause" for relief against

¹⁵⁰ *Freiberg v. Schloss*, 112 N.E.2d 352 (Ohio Prob. 1953). See also *In re Salomon's Will*, 282 App. Div. 881, 124 N.Y.S.2d 610 (2d Dep't 1953); *In re Kohn's Estate*, 124 N.Y.S.2d 861 (Surr. Ct. 1953).

¹⁵¹ *Donnelly v. Montgomery County Welfare Board*, 92 A.2d 354 (Md. App. 1952). Such claims have been held subject to the widow's allowance if she did not join in the application for assistance. *Elkhart County Dep't of Public Welfare v. Kehr*, 112 N.E.2d 451 (Ind. App. 1953). But they are not lien claims which are excepted from the priority of debts due to the United States. *In re Lane's Estate*, 59 N.W.2d 593 (Iowa 1953).

¹⁵² *Mueller v. Shacklett*, 156 Neb. 881, 58 N.W.2d 344 (1953).

¹⁵³ See *Arguello Estate Protective Ass'n v. Crofton*, 258 P.2d 97 (Cal. App. 1953) (statute not retroactive); cf. *Casey v. Katz*, 114 Cal. App.2d 391, 250 P.2d 291 (1952); see also *Byrd v. Riggs*, 87 Ga. App. 7, 73 S.E.2d 35 (1952) (statute prohibiting commencement of action for debt until expiration of one year after letters — see also text at nn.155, 156 *infra*).

¹⁵⁴ *Casey v. Katz*, *supra* note 153.

¹⁵⁵ *Herman v. Watson*, 114 N.E.2d 1 (Mass. 1953).

¹⁵⁶ *Alexander v. Wyatt's Estate*, 259 S.W.2d 126 (Mo. App. 1953).

the bar was not shown where the residence of the decedent driver of an automobile was a matter of record and the claimant had initiated administration proceedings in another county.¹⁵⁷ Likewise one who knew decedent's residence and the fact of his death was deemed to have "actual notice" of the appointment of an administrator for his estate.¹⁵⁸ However, a divided court in Ohio held that one imprisoned in the county jail was a person "in captivity," and within the exception for persons under legal disability, although he had access to the outside world and could have presented his claim.¹⁵⁹

Although no objection was made by the foreign heirs it was held by a California court that the court of probate should refuse to assent to the request of the administrator to approve a claim barred by the nonclaim statute.¹⁶⁰ The doctrine that it is the duty of the personal representative to assert the nonclaim defense becomes nebulous indeed under an Indiana decision,¹⁶¹ dealing with a case in which the administrator chose to defend a barred claim on the merits; the heirs were permitted to participate in the trial but the claim was established and the heirs' petition for a new trial was denied, whereupon they brought action against the administrator for his failure to utilize the nonclaim defense. The latter action was dismissed on the grounds that the heirs should have appealed from the claimants' judgment and that the damage action constituted a collateral attack upon the judgment. An extended note¹⁶² advocates the replacement of the administrator by the heirs for the purpose of such litigation. However, justice would also be served if the court would assert the nonclaim bar *ex mero motu*.

In a jurisdiction wherein decedent's real property can be sold only upon the order of the district court, it was held that the probate court's approval of a settlement of a claim by the administrator's deed to the claimant was no defense to a subsequent action by the heirs to quiet title.¹⁶³ A closer question would arise as to whether such collateral attack would be allowed in typical jurisdictions wherein the court of probate may order sale of land for the purpose of paying debts but lacks specific authority to order conveyance to effect a compromise of a claim.

¹⁵⁷ In re Rathe's Estate, 157 Neb. 183, 194, 59 N.W.2d 164, 170 (1953).

¹⁵⁸ In re Marrs' Estate, 111 N.E.2d 604 (Ohio App. 1951), *aff'd*, 158 Ohio St. 95, 107 N.E.2d 148 (1952).

¹⁵⁹ In re Gogan's Estate, 108 N.E.2d 170 (Ohio App. 1951).

¹⁶⁰ In re Erwin's Estate, 117 Cal. App.2d 203, 255 P.2d 97 (1953).

¹⁶¹ Riddell Nat. Bank v. Englehart, 105 N.E.2d 357 (Ind. App.), rehearing denied, 106 N.E.2d 465 (Ind. App. 1952).

¹⁶² 28 Ind. L.J. 272 (1953).

¹⁶³ Emblem v. Emblem, 260 P.2d 693 (N.M. 1953).

Funeral expenses are not strictly claims against the decedent since they are incurred after his death, and it is usually declared that the ordinary nonclaim statute does not apply to them. However, the Maine court held that a funeral claim asserted nine years after the death was barred under a statute forbidding action "upon any claim against the decedent when no administration is had within 6 years from the date of death."¹⁶⁴ It is clear enough that the decedent's estate is liable for funeral expenses, and contrary to the rule at common law this is usually true even if the decedent is a married woman.¹⁶⁵ One who pays funeral expenses is entitled to reimbursement from the estate unless he is a "volunteer" or a "meddler."¹⁶⁶ Selection of the casket and approval of the funeral arrangement by testator's niece were held not to imply an agreement by her to pay the undertaker.¹⁶⁷ However, an agreement, between the person causing the death of an infant and the undertaker, that the former should be liable for the agreed expense of the funeral was held to preclude recovery by the latter against the minor's estate or his father for a more expensive type of funeral.¹⁶⁸

Exoneration.—Without mention of the term this doctrine was applied in an unusual North Carolina case,¹⁶⁹ wherein the will left the testator's land to the widow for life and also bequeathed her most of the personalty. She sought to impose a specific lien upon the real property for money which she had advanced to decedent for improvements thereon. The court considered her lien claim as dubious, but regardless of that asserted that it would be the executor's duty to sell the personal property in order to pay the debt, and that only upon a showing of insufficiency of the personalty should a sale of the land be ordered. Under a statute providing that a legatee takes the bequest subject to encumbrances unless the will provides otherwise, it was held that the formal clause directing payment of debts and funeral expenses does not disclose an intention that the executors should pay a chattel mortgage upon an automobile or satisfy the pledge of securities, both of which were specifically bequeathed.¹⁷⁰

¹⁶⁴ Duddy v. McDonald, 97 A.2d 445 (Me. 1953).

¹⁶⁵ Lowry v. Dennis, 110 Cal. App.2d 667, 243 P.2d 579 (1952), 26 So. Calif. L. Rev. 94; Smith v. Ridpath, 207 Okla. 638, 251 P.2d 1036 (1953).

¹⁶⁶ In re Kemmerrer, 114 Cal. App.2d 810, 251 P.2d 345 (1952) (mother); In re Rejebian's Estate, 115 N.Y.S.2d 839 (Surr. Ct. 1952) (mother); Smith v. Ridpath, *supra* note 165 (husband).

¹⁶⁷ Giguere v. Webber, 98 A.2d 548 (Me. 1953).

¹⁶⁸ Barry Funeral Home v. Norris, 216 Miss. 457, 62 So.2d 768 (1953).

¹⁶⁹ Rouse v. Rouse, 237 N.C. 492, 75 S.E.2d 300 (1953).

¹⁷⁰ In re Ide's Will, 120 N.Y.S.2d 650 (Surr. Ct. 1953). See Note, 40 Calif. L. Rev. 457 (1952), for a general discussion of exoneration.

Renunciation.—It has usually been thought that while the provisions of a will can be renounced by the devisee or legatee, intestate interests vest at once upon the death and can only be *transferred* by the heir or distributee.¹⁷¹ The latter position has been attacked as being without historical basis or constitutional support.¹⁷² North Carolina legislation deals with the matter in forthright fashion by permitting the beneficiary of an intestate estate to renounce prior to settlement of the estate without gift tax liability.¹⁷³

Retainer.—Decisions in New York and Ohio conclude that the personal representative may not retain from legacies or distributive shares on account of the legatees' or distributees' debts which were outlawed at the decedent's death.¹⁷⁴ To the writer it is not convincing that this viewpoint explodes the poppycock about "right without remedy" usually enunciated in the cases following the orthodox English position allowing retainer, nor that the holdings provide a uniform result in actions at law and in administration proceedings. The analogy of advancements and the fact that the representative is asserting something in the nature of a lien present powerful arguments for the orthodox holding which has much American support. Where there is a will there is every reason to distinguish between debts barred at the time of execution and those barred thereafter.¹⁷⁵ There would probably be little disagreement with the holding in another New York case that the executor may retain for a debt which was not barred at the testator's death and that the right of retainer may be asserted against the assignee of the legatee.¹⁷⁶

Accounting and Decree.—In a Pennsylvania case¹⁷⁷ the executor was charged with receipts from rentals and interest upon yearly balances over a period of twenty years in absence of showing that the delay of the beneficiaries in asserting their contentions made the accounting difficult or inequitable.

Surcharges for overpayments to some of the distributees were involved in a New Jersey case¹⁷⁸ wherein the intestate died in 1935,

¹⁷¹ See 3 American Law of Property § 14.15 (Casner ed. 1952).

¹⁷² Rochner & Roehner, *Renunciation as Taxable Gift—An Unconstitutional Federal Tax Decision*, 8 Tax L. Rev. 289 (1953); see also 9 id. 100-01 (1953).

¹⁷³ N.C. Laws 1953, c. 1101.

¹⁷⁴ *In re Riley's Will*, 281 App. Div. 612, 121 N.Y.S.2d 394 (4th Dep't 1953) (will); *Summers v. Connolly*, 159 Ohio St. 396, 112 N.E.2d 391 (1953) (intestate).

¹⁷⁵ *In re Riley's Will*, supra note 174, one of the notes was made before the will but was not then barred. As to provision of will regarding retainer, see *In re Wildenstein's Estate*, 122 N.Y.S.2d 691 (Surr. Ct. 1953).

¹⁷⁶ *In re Eaton's Estate*, 282 App. Div. 32, 121 N.Y.S.2d 836 (3d Dep't 1953) (statute tolled since death because of legatee's absence from the state).

¹⁷⁷ *In re Meyer's Estate*, 173 Pa. Super. 592, 98 A.2d 444 (1953).

¹⁷⁸ *In re Ackerman's Estate*, 23 N.J. Super. 316, 93 A.2d 31 (App. Div. 1952).

survived by fourteen groups of heirs. The original administrator made a number of voluntary payments and in 1938 filed an account showing these, which account was allowed. Later in the same year the court authorized a certain payment to group 12. Some of the groups including group 12 were overpaid, and in 1951 the substituted administrator sought to surcharge the original administrator on account of the overpayments. It was held: (1) that a decree allowing an account wherein the representative credits himself with money paid to a distributee beyond this just proportion furnishes no protection for making the overpayment; (2) since the 1938 payment to group 12 was authorized by the court there would be no surcharge on account of that payment; (3) eliminating group 12 from consideration, it was found that two groups were overpaid and surcharges were imposed in the amount of those overpayments; and (4) interest was not allowed because of the late date of the proceedings for surcharge.

This is not a charging of the representative for funds for which he did not account. Unless placed upon the ground that the 1938 decree was *intermediate* or that the attack was direct, it is not easy to distinguish the holding from those falling within the principle forbidding an attack upon a decree in absence of proof of extrinsic fraud *which prevented a fair hearing*.¹⁷⁰

IV

CONCLUSION

The year's progress in the field of succession is typical of the slow, steady growth found in the older areas of the law. Major changes come mainly through legislation, but here and there ingenious sallies into the untried, and the constant extensions of principles beyond old boundaries demonstrate the vitality of our case law.

¹⁷⁰ In re Luer's Estate, 348 Ill. App. 324, 108 N.E.2d 792 (1952); In re Anderson's Estate, 175 Kan. 18, 259 P.2d 180 (1953); In re Knapp's Estate, 149 Me. 130, 99 A.2d 331 (1953); Garteiz v. Garteiz, 254 P.2d 804 (Nev. 1953); Tiller v. Norton, 253 P.2d 618 (Utah 1953) (existence of children). See also In re De Penning's Estate, 58 N.W.2d 9 (Iowa 1953) (intermediate order). But cf. In re Spinosa's Estate, 117 Cal. App.2d 364, 255 P.2d 843 (1953); Cardozo v. Bank of America Nat. Trust & Savings Ass'n, 116 Cal. App.2d 833, 254 P.2d 949 (1953); In re Manfredini, 24 N.J. Super. 59, 93 A.2d 623 (App. Div. 1952); Emblem v. Emblem, 260 P.2d 693 (N.M. 1953) (lack of jurisdiction). See also note 163 *supra*.

FEDERAL JURISDICTION AND PRACTICE

HERBERT PETERFREUND

SEPTEMBER 16, 1953, marked the fifteenth anniversary of the advent of the Federal Rules of Civil Procedure.¹ While particular rules are still being criticized and some amendments are now being considered by the Advisory Committee,² opposition to the Rules as a system of practice has long since disappeared. On the whole, the Federal Rules have achieved the objective set by Chief Justice Hughes: "a simplified practice which will strip procedure of unnecessary forms, technicalities and distinctions, and permit the advance of causes to the decision of their merits with a minimum of procedural encumbrances."³

The year was more than a routine year for the federal judiciary. While procedural history was being made in the *Rosenberg* case,⁴ the Supreme Court decided a number of important questions which have long plagued the lower federal courts. By necessity, therefore, much of this survey will be devoted to discussion of the many Supreme Court decisions on jurisdictional and procedural problems.

Two excellent teaching books appeared during the year. One is designed for a basic course in civil procedure,⁵ the other for an advanced course in federal jurisdiction.⁶ Both attest to the importance and prestige of the federal courts in our legal structure.

I

JURISDICTION⁷

Federal Question Jurisdiction.—Recent cases indicate considerable expansion in federal question jurisdiction, notwithstanding congressional attempts to restrict such jurisdiction to a minimum number

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¹ The Enabling Act, 28 U.S.C. §§ 723b, 723c (1946), was passed in 1934 and the Advisory Committee appointed by the Supreme Court in 1935. After the Committee's proposals were subjected to intense scrutiny throughout the nation, they were approved by the Court and became effective September 16, 1938. Extensive amendments were made in 1948 and a few changes in 1951.

² See The United States Supreme Court Advisory Committee on Rules for Civil Procedure, 39 A.B.A.J. 754 (1953); Clark, "Clarifying" Amendments to the Federal Rules?, 14 Ohio St. L.J. 241 (1953).

³ 12 Am. Law Inst. Proc. 54, 57 (1935).

⁴ *Rosenberg v. United States*, 344 U.S. 838, 889 (1952), 345 U.S. 965, 989, 1003 (1953), 346 U.S. 271, 273, 322, 324 (1953). The case is discussed under Appellate Procedure, p. 719 *infra*.

⁵ Field & Kaplan, *Materials for a Basic Course in Civil Procedure* (1953).

⁶ Hart & Wechsler, *The Federal Courts and the Federal System* (1953).

⁷ See Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts:*

of cases where a real necessity exists.⁸ In applying Section 1331 of the Judicial Code (giving the district courts "original jurisdiction of all civil actions wherein the matter in controversy exceeds . . . \$3,000 . . . and arises under the Constitution, laws, or treaties of the United States"), the first circuit held⁹ that a district court may exercise jurisdiction over a maritime claim, in the absence of diversity of citizenship and even though the court is not sitting in admiralty.¹⁰ This appears to be the first case squarely holding that a district court sitting on the law side has such jurisdiction.¹¹ In another case,¹² the fifth circuit held that an action for personal injuries received on federal property located in Georgia could likewise be brought in the district court since the claim arose "under the laws of the United States." Just as it might be argued that the incorporation of general maritime law into the Constitution¹³ does not establish a case "arising under the Constitution,"¹⁴ so too it would appear that the exclusive legislative authority (over federal "islands") given to the Federal Government by the Constitution¹⁵ does not establish a case "arising under the laws of the United States."¹⁶ As the Supreme Court has said, "The federal nature of the right to be established is decisive—not the source of the authority to establish it."¹⁷

An Exercise in Dialectic, 66 Harv. L. Rev. 1362 (1953); De la Rama S.S. Co. v. United States, 344 U.S. 386 (1953).

⁸ See Frankfurter, Distribution of Judicial Power between United States and State Courts, 13 Cornell L.Q. 499, 515 et seq. (1928); Mishkin, The Federal "Question" in the District Courts, 53 Col. L. Rev. 157, 159 (1953).

⁹ Doucette v. Vincent, 194 F.2d 834 (1st Cir. 1952). See Note, 66 Harv. L. Rev. 315 (1952).

¹⁰ 28 U.S.C. § 1333 (Supp. 1952) gives the district court exclusive original jurisdiction of any "civil case of admiralty or maritime jurisdiction." Obviously plaintiff was interested in obtaining a jury trial under § 1331. Had there been diversity of citizenship he would have gotten a jury trial under § 1332.

¹¹ A dictum to the same effect is contained in Jansson v. Swedish American Line, 185 F.2d 212, 217-18 (1st Cir. 1950).

¹² Mater v. Holley, 200 F.2d 123 (5th Cir. 1952), 5 Stan. L. Rev. 823 (1953), 101 U. of Pa. L. Rev. 1076 (1953). The negligence occurred in Fort McPherson, Georgia, and both parties were Georgia citizens.

¹³ U.S. Const. Art. III, § 2, provides that federal judicial power shall extend "to all Cases of admiralty and maritime Jurisdiction."

¹⁴ Jordine v. Walling, 185 F.2d 662 (3d Cir. 1950). Contra: Doucette v. Vincent, 194 F.2d 834 (1st Cir. 1952).

¹⁵ U.S. Const. Art. I, § 8, cl. 17 gives the Federal Government power to exercise "exclusive Legislation" over areas ceded by the states.

¹⁶ Until abrogated or changed by Congress, state laws remain in force. James Stewart & Co. v. Sadrakula, 309 U.S. 94 (1940).

¹⁷ Puerto Rico v. Russell & Co., 288 U.S. 476 (1933). This was a tax suit by Puerto Rico. Defendant had the case removed to the federal court on the theory that the taxing power was derived from federal laws. The Supreme Court reversed with instructions to remand. The Court said: "Federal jurisdiction may be invoked to vindicate a right or privilege claimed under a federal statute. It may not be invoked

In this connection, it is interesting to observe that the Supreme Court recently held that the doctrine of *Erie R.R. v. Tompkins*¹⁸ would not be applied, where the federal court was sitting in admiralty, to a libel brought to enforce a state wrongful death statute.¹⁹ The Court believed that federal practice controlled the question of permitting an administrator to amend his libel so as to allege his appointment at a time when the state statute of limitations had run. Said the Court:

Even in diversity cases, when "a right is enforceable in a federal as well as in a State court," and the federal court sits as "another court of the State," we have recognized that "the forms and mode of enforcing the right may at times, naturally enough, vary because the two judicial systems are not identic. . . ." Whether, if this were a diversity case, we would consider that we are here dealing with "forms and modes" or with matters more seriously affecting the enforcement of the right, it is clear that we are not dealing with an integral part of the right created by Kentucky.²⁰

Removal Jurisdiction.—Cases on this topic are legion, as usual, and merely add to the many "refinements and subtleties" besetting lawyers and judges alike. Only a few interesting decisions may be mentioned here.

Who may remove? In one diversity case,²¹ the court held that a nonresident plaintiff, against whom a counterclaim had been filed, had no power to remove. This is in line with a 1941 Supreme Court decision,²² although it should be noted that the present Judicial Code²³ does not in terms limit the power to defendants. In another case, the court held that a defendant alien could remove an action irrespective of his residence or domicile.²⁴ If this is sound, an alien has an unlimited right to remove in diversity cases while the citizen's right is strictly limited.

What is "a separate and independent claim or cause of action"

when the right asserted is non-federal, merely because the plaintiff's right to sue is derived from federal law, or because the property involved was obtained under federal statute." Id. at 483.

¹⁸ 304 U.S. 64 (1938).

¹⁹ *Levinson v. Deupree*, 345 U.S. 648 (1953).

²⁰ Id. at 652.

²¹ *Lee Foods Div., Consol. Grocers Corp. v. Bucy*, 105 F. Supp. 402 (W.D. Mo. 1952), 53 Col. L. Rev. 282 (1953).

²² *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941).

²³ 28 U.S.C. § 1441(c) (Supp. 1952), quoted in note 25 infra. Cf. 28 U.S.C. § 1441(a) (Supp. 1952) (diversity cases).

²⁴ *Jacobson v. Malaxa*, 113 F. Supp. 111 (S.D.N.Y. 1953). The difficulty is caused by the wording of 28 U.S.C. § 1441(b) (Supp. 1952), which changed the terminology of the former provision to permit removal by noncitizens instead of by nonresidents.

removable under Section 1441(c) of the Judicial Code?²⁵ As many have predicted, the lower federal courts are bogged down in attempting to apply this provision.²⁶ It would appear that separate and independent claims are *not* presented where "there is a single wrong to plaintiff . . . arising from an interlocked series of transactions, and recovery upon one of the claims could be pleaded in partial satisfaction in a subsequent action."²⁷ The corollary of the proposition, that separate and independent claims *are* presented where recovery on one would not preclude enforcement of the other, does not, however, necessarily follow.²⁸ It is significant, also, that in permitting the removal of nonfederal claims unrelated to removable claims, Section 1441(c) may run into constitutional difficulties.²⁹ At least one court has recognized this possibility.³⁰

What is the proper venue of a removed action? Section 1441(a) expressly provides that removal is "to the district court of the United States for the district and division embracing the place where such action is pending." In *Polizzi v. Cowles Magazines*³¹ the Supreme Court held that this provision applies to a corporate defendant, and the question whether the corporation is "doing business" within the general venue provision is irrelevant.³² Three justices dissented from the Court's action in remanding the case to the district court for determination of jurisdiction over the defendant's person, a question bypassed by the lower courts in dismissing the action.³³

²⁵ "Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction." 28 U.S.C. § 1441(c) (Supp. 1952).

²⁶ See, e.g., *Wade v. New York Fire Ins. Co.*, 111 F. Supp. 748 (E.D. Wash. 1953); *Reynolds v. Bryant*, 107 F. Supp. 704 (S.D.N.Y. 1952); *Henry Kraft Mercantile Co. v. Hartford Accident & Indemnity Co.*, 107 F. Supp. 505 (W.D. Mo. 1952).

²⁷ *Weldon v. Liberty Nat. Life Ins. Co.*, 112 F. Supp. 315, 317 (M.D. Ala. 1953).

²⁸ In *American Fire & Cas. Co. v. Finn*, 341 U.S. 6 (1951), in interpreting 28 U.S.C. § 1441(c) (Supp. 1952), the Court indicates that *Barney v. Latham*, 103 U.S. 205 (1881) would not now be removable. Yet in that case the two sets of claims were neither alternative nor overlapping. Recovery on one would not preclude enforcement of the other.

²⁹ See *Lewin, The Federal Courts' Hospitable Back Door—Removal of "Separate and Independent" Non-Federal Causes of Action*, 66 Harv. L. Rev. 423 (1953). But cf. *Moore, Commentary on the United States Judicial Code § 0.03(37)* (1949).

³⁰ *Finn v. American Fire & Cas. Co.*, 207 F.2d 113, 116 (5th Cir. 1953).

³¹ 345 U.S. 663 (1953).

³² 28 U.S.C. § 1391(c) (Supp. 1952) provides that a "corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes." (Emphasis supplied.) See Note, *Federal Venue and the Corporate Plaintiff: Judicial Code Section 1391(c)*, 28 Ind. L.J. 256 (1953).

³³ The dissenting justices thought it unfortunate that the case had to go back

Venue.—In *Pope v. Atlantic Coast Line R.R.*³⁴ the Supreme Court reaffirmed its decision of a decade ago,³⁵ holding that a state court could not enjoin an action under the Federal Employers' Liability Act where venue requirements were met. However inconvenient the forum, "Congress has deliberately chosen to give petitioner a transitory cause of action" and such provision³⁶ "displaces the traditional 'power of a state court to enjoin its citizens, on the ground of oppressiveness . . . from suing . . . in the . . . courts of another state.'"³⁷ When confronted with the argument that the result of the earlier case was overruled by implication with the passage of Section 1404(a) of the Judicial Code,³⁸ the Court stated that the transfer provision spoke only to the federal courts and had no effect on state courts. Mr. Justice Frankfurter, dissenting, felt that Congress had "cut the ground" from earlier cases. He relied heavily on the reviser's note³⁹ to the transfer provision giving a similar case⁴⁰ as an example of the need for the provision. He believed it "blind literalness" in statutory construction to assume that Congress would allow dismissal under a local *forum non conveniens* doctrine⁴¹ or transfer under Section 1404(a) but not an injunction against a harassing forum.

As matters now stand under FELA, an injured railroad employee may bring his suit in a distant federal or state court. The federal court may transfer the case under Section 1404(a) of the Judicial Code; the state court may dismiss under its own *forum non conveniens* doctrine; but the state court of the employee's residence cannot enjoin the suit. If, therefore, the forum state court does not use *forum non conveniens*, it must try the case. Since few states now employ

to the district court for reconsideration of the same old "doing business" question, even though now for a jurisdictional rather than a venue purpose. Mr. Justice Black preferred to decide the matter on the International Shoe Co. doctrine. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

³⁴ 345 U.S. 379 (1953).

³⁵ *Miles v. Illinois Cent. R.R.*, 315 U.S. 698 (1942).

³⁶ 35 Stat. 66 (1910), as amended, 45 U.S.C. § 56 (Supp. 1952) provides that "an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action."

³⁷ *Pope v. Atlantic Coast Line R.R.*, 345 U.S. 379, 383 (1953).

³⁸ "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a) (Supp. 1952).

³⁹ H.R. Rep. No. 308, 80th Cong., 1st Sess., App. 132 (1947); 28 U.S.C. following § 1404(a) (Supp. 1952).

⁴⁰ *Baltimore & Ohio R.R. v. Kepner*, 314 U.S. 44 (1941).

⁴¹ A few states have this doctrine. See Barrett, *The Doctrine of Forum Non Conveniens*, 35 Calif. L. Rev. 380, 388 (1947). The Supreme Court has held that a state court can apply its local doctrine to FELA actions. *Missouri ex rel. Southern Ry. v. Mayfield*, 340 U.S. 1 (1950).

this doctrine, harassment of an employer is still possible. On the other hand, free use of the injunction by the employer could very well destroy the employee's wide choice of venue under the liberal venue provisions of the FELA. The problem has always been a difficult one, to which no completely satisfactory solution has yet been devised.⁴²

In *Olberding v. Illinois Central R.R.*⁴³ the Supreme Court settled a question which has aroused considerable controversy and perplexed some of the best legal minds in the nation, although as one capable judge recently stated, "The settlement of the question . . . is not one which, either way, will shake the foundations of American jurisprudence."⁴⁴ Plaintiff, an Illinois corporation, sued an Indiana citizen for damages arising out of the operation of defendant's truck in Kentucky. Defendant was served in accordance with the Kentucky non-resident motorist statute,⁴⁵ making the Secretary of State his agent for service. Defendant's motion to dismiss on the ground of improper venue⁴⁶ was denied by the Federal District Court for the Western District of Kentucky and, after a trial, verdict and judgment were rendered for the plaintiff. The court of appeals affirmed, following the waiver theory of most courts which had passed on the question.⁴⁷ The United States Supreme Court, however, reversed and, in an opinion by Mr. Justice Frankfurter, held that the nonresident defendant (by operating his motor vehicle in Kentucky) did not waive his rights under the federal venue statute. The Court found this conclusion "entirely loyal" to the famous *Neirbo* decision⁴⁸ by stating

⁴² For suggestions see 3 Ala. L. Rev. 192, 200 (1950); 30 N.C.L. Rev. 168 (1952). Bloemker, A Procedural Review of the Federal Employer's Liability Act, 10 Wash. & Lee L. Rev. 161 (1953), contains a good discussion of the entire problem.

⁴³ 346 U.S. 338 (1953).

⁴⁴ Goodrich, J., in *McCoy v. Siler*, 205 F.2d 498, 500 (3d Cir. 1953). For a recent discussion of the problem see Bayler & Steininger, The Effect of the Non-Resident Motorists Statute on Federal Venue Provisions, 32 Neb. L. Rev. 383 (1953).

⁴⁵ "Any non-resident operator or owner of any motor vehicle who accepts the privilege extended by the laws of this state to operate motor vehicles or have them operated within this state shall, by such acceptance and by the operation of such motor vehicle within this state, make the Secretary of State his agent for the service of process in any civil action instituted in the courts of this state against the operator or owner arising out of or by reason of any accident or collision or damage occurring within this state in which the motor vehicle is involved." Ky. Rev. Stat. § 188.020 (1953). A procedure is also set up for serving the Secretary of State who in turn must notify the defendant by registered mail. Ky. Rev. Stat. § 188.030 (1953).

⁴⁶ 28 U.S.C. § 1391(a) (Supp. 1952) confines the venue to "the judicial district where all plaintiffs or all defendants reside."

⁴⁷ See, e.g., *Falter v. Southwest Wheel Co.*, 109 F. Supp. 556 (W.D. Pa. 1953), 38 Cornell L.Q. 624, citing many cases. Contra: *Martin v. Fishbach Trucking Co.*, 183 F.2d 53 (1st Cir. 1950); *McCoy v. Siler*, 205 F.2d 498 (3d Cir. 1953); *Waters v. Plyborn*, 93 F. Supp. 651 (E.D. Tenn. 1950).

⁴⁸ *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165 (1939), holding that

that *Neirbo* rested on actual consent (i.e., the express designation of an agent for service), whereas the nonresident motorist "never consented to anything." Consent to be sued was merely "attributed" to him because of his actions in the state, and any talk of "implied consent" was a mere fiction.

If it is sound, as the majority opinion states, that the *Neirbo* doctrine rests on true consent, then the waiver doctrine should not be applied in the instant situation. As the dissenting opinion of two justices indicates, however, there is "no difference of substance between the signing of a paper under the [state] statute upon which *Neirbo* is based and the acceptance, by action in driving a motor car, of the privilege of using state highways under the Kentucky statute. In each case there was no federal venue except by waiver and consent."⁴⁰ Realistically, even a corporation which expressly appoints an agent for service may not actually consent to suit. It is merely conforming with a condition which has been placed on its doing business in that state and, if a statute should so provide, might be sued in that state even if it did not appoint the agent or consent.⁵⁰ Is not the real basis of jurisdiction over a foreign corporation its doing business in the state?⁵¹ If so, in states which provide that carrying on business is deemed an appointment of the Secretary of State as agent, the "consent" is exactly the same, except that one involves continuous acts whereas the other involves merely an isolated act of driving in the state.

On a policy level, the decision in the *Olberding* case leaves much to be desired. Arguments of convenience and fairness dictate that automobile accident cases be tried at the situs of the accident. The nonresident motorist statutes have made this feasible insofar as the state courts are concerned. Yet since the waiver doctrine is not applied, the defendant has a choice of forum which the plaintiff does not enjoy. The plaintiff is restricted to a state court,⁵² while the de-

federal venue provisions were waived by a foreign corporation which designated an agent for service as required by state statute. The Supreme Court reasoned that the designation amounted to consent to be sued in all courts sitting in the state, federal and state, and hence constituted a waiver of federal venue requirements.

⁴⁰ *Olberding v. Illinois Cent. R.R.*, 346 U.S. 338, 345 (1953).

⁵⁰ *Knott Corp. v. Furman*, 163 F.2d 199 (4th Cir.), cert. denied, 332 U.S. 809 (1947). Defendant corporation did not expressly designate an agent for service in Virginia but the court held that, by doing business in the state, defendant not only consented to suit and service of process upon a designated state officer but also waived its federal venue privilege. *Contra: Robinson v. Coos Bay Pulp Corp.*, 147 F.2d 512 (3d Cir. 1945).

⁵¹ See Learned Hand, J., in *Smolk v. Philadelphia & Reading Coal & Iron Co.*, 222 Fed. 148, 151 (S.D.N.Y. 1915).

⁵² A nonresident plaintiff has three choices; the state of his residence, but here he usually cannot serve the defendant; the state of defendant's residence, but this

fendant may remove the case to the local federal court. The plaintiff may prefer to sue in the federal court for several reasons, such as, a less crowded calendar and superior rules of procedure.⁵³ Certainly the time seems ripe for congressional action permitting trial of non-resident motorist cases in the most convenient federal forum.⁵⁴

II

PLEADING AND PARTIES

The Pleadings.—"Let thy speech be short, comprehending much in a few words."—*Ecclesiasticus*, xxxii, 8.

The battle over Federal Rule 8, requiring a complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief," rages on. Late in 1952, at the Judicial Conference of the Judges of the Ninth Circuit, a resolution was adopted to add the following words to the Rule: "which statement shall contain the facts constituting a cause of action."⁵⁵ If this proposal should be adopted, much of the old and wasted learning on the requisites of a "cause of action," facts versus law and evidence, and common-law demurrers may be revived. In spite of some difficulties which are all too apparent,⁵⁶ one cannot help but feel that there is little wrong with the rule as stated, except the failure of the courts to apply it properly. The rule does *not* adopt notice pleading, as Judge Charles Clark once seemed to indicate;⁵⁷ it does require statement of a claim "showing that the pleader is entitled to relief." If district judges would apply this rule properly and counsel would employ discovery and pre-trial techniques to define issues, many of the objections

may entail considerable expense and inconvenience; and the state where the tort occurred. The last mentioned is by far the most convenient: witnesses are there; complexities of conflict of laws are avoided; there is no problem of obtaining jurisdiction over defendant's person.

⁵³ Maintenance of suit in the federal court of the state where the tort occurred would subject the defendant to no additional inconvenience and hence the basic purpose of the federal venue statute is not violated.

⁵⁴ By statute, 28 U.S.C. § 1391(c) (Supp. 1952), a corporation cannot now object to venue laid in a district where it is doing business. Congress might alleviate the venue problems of the nonresident motorist in a similar manner.

⁵⁵ Claim or Cause of Action, 13 F.R.D. 253-79 (1952). See also McCaskill, *The Modern Philosophy of Pleading: A Dialogue Outside the Shades*, 38 A.B.A.J. 123 (1952).

⁵⁶ Such as the heavy burden placed upon counsel, by discovery and pre-trial, to ascertain the real issues before trial; the danger of uncertainty at the trial; and imperiling of res judicata after judgment.

⁵⁷ *Dioguardi v. Durning*, 139 F.2d 774, 775 (2d Cir. 1944). See Clark, "Clarifying" Amendments to the Federal Rules?, 14 Ohio St. L.J. 241, 245 (1953): "There never was any purpose or program to adopt or advance notice pleading, in spite of a later occasional loose judicial epigram; this is demonstrated not merely by the history of the drafting and the rules themselves, but, beyond question, by the forms attached to the rules."

to Rule 8 would disappear. A return to fact-pleading or issue-pleading would be a step backward leading only to delay, haggling over form and, worst of all, a postponement of the merits of the case.⁵⁸

One court of appeals recently stated that, when Rule 8 is violated, the district court "should order the pleading to be recast in appropriate form, on pain of dismissal."⁵⁹ Apparently there is no limit to the number of times plaintiff can try to meet the requirements. In one well-known case,⁶⁰ plaintiff (representing himself) had eleven (11) complaints dismissed for failure to comply with Rule 8. The last dismissal was with prejudice and without leave to plead over. Surely this indicates amazing judicial patience. Not quite so patient was a competent district judge who, on his own motion, dismissed a complaint⁶¹ because it indulged in numerous allegations which were "libelous, scandalous, vituperative and impertinent."⁶²

Two cases involving counterclaims deserve at least passing attention. In one,⁶³ seemingly a novel situation, the court held that the Federal Government, in bringing suit for damage to its vehicle, could not preclude the defendant (on the ground that the limitation period of the Federal Tort Claims Act had expired)⁶⁴ from asserting a counterclaim for damages arising out of the same accident.⁶⁵ In the other case, the court held that dismissal of a complaint does not

⁵⁸ The Federal Rules permitting general pleading, discovery, pre-trial and summary judgment, and limiting objections to pleadings, are designed to enable counsel and the court to reach the merits quickly with a minimum of technical proceduralism. A change in Rule 8 would seriously affect the basic structure of the rules, as Clark, *supra* note 57, at 246, indicates. Moreover, it would create considerable confusion in those states which have adopted and followed the federal practice.

⁵⁹ *Condol v. Baltimore & Ohio R.R.*, 199 F.2d 400, 402 (D.C. Cir. 1952).

⁶⁰ *Vance v. American Soc'y of Composers*, 14 F.R.D. 30 (S.D.N.Y. 1953).

⁶¹ Is this authorized by the rules? Rule 12(b) authorizes a motion to dismiss for "failure to state a claim upon which relief can be granted." Rule 12(f) authorizes the court to "order stricken from any pleading any redundant, immaterial, impertinent, or scandalous matter." The rules do not state that an entire pleading can be stricken for impertinent or scandalous allegations.

⁶² *Pollack v. Aspbury*, 14 F.R.D. 454 (S.D.N.Y. 1953). The good judge had ample justification for his wrath. The complaint, directed against some very prominent citizens, alleged that one defendant was known as a "faker, swindler, briber, grafter, jury fixer, perjurer, extortionist, home breaker, and a double crosser"; another defendant was characterized as a "typical gangster type of a shyster lawyer," etc. The judge concluded his remarks by adding that "if plaintiff should again file [such] a pleading . . . I shall not hesitate to cite him for contempt of court."

⁶³ *United States v. Capital Transit Co.*, 108 F. Supp. 348 (D.D.C. 1952). Cf. *United States v. Double Bend Mfg. Co.*, 114 F. Supp. 750 (S.D.N.Y. 1953) (Tucker Act).

⁶⁴ 28 U.S.C. § 2401(b) (Supp. 1952) provides for a two-year statute of limitations.

⁶⁵ Cf. *Republic of China v. American Express Co.*, 195 F.2d 230 (2d Cir. 1952), holding that a counterclaim may be asserted against a friendly foreign sovereign only if based on the subject matter of the action. In such event, the sovereign has "waived immunity" or "consented" to the counterclaim. The same rule applies to suits by the United States. See *United States v. Patterson*, 206 F.2d 345 (5th Cir. 1953).

require dismissal of a compulsory counterclaim which is supported by an independent ground of federal jurisdiction.⁶⁸

*Parties.*⁶⁹—Current cases indicate that, in practice, Rule 14 authorizing impleader continues to work badly. Under the present system, impleader is discretionary and requires a motion in advance. This motion raises not only the problem of determining the liability of the prospective third-party defendant but also jurisdictional problems⁶⁸ and the nature of the new issues to be brought into the suit.⁶⁹ Even though this motion is granted, the third-party defendant may later move to vacate the previous order and require a redetermination of the entire matter. One court refused to relitigate the matter, although it is difficult to see how the third-party defendant had his day in court on the issue.⁷⁰ Perhaps Rule 14 should be changed to permit impleader without court order and have the propriety thereof determined when the motion to vacate is made. This is now the practice in the state courts of New York.⁷¹

In an original suit brought by the State of New Jersey against the State of New York for injunctive relief against diversion of Delaware River waters, the Supreme Court refused to permit the City of Philadelphia to intervene. Since the Commonwealth of Pennsylvania was already a party (by intervention), the Court felt that the interests of the state and all its citizens were properly represented. Said the Court:

An intervenor whose state is already a party should have the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state.⁷²

Mr. Justice Jackson, in dissent, believed the Court's decision unfair to Philadelphia since New York City, one of the original defendants, was in a position to present its claims. Realistically, both cities, having home-rule powers, had important interests at stake. Any

⁶⁸ *Pioche Mines Consol. v. Fidelity-Philadelphia Trust Co.*, 206 F.2d 336 (9th Cir.), cert. denied, 74 Sup. Ct. 225 (1953).

⁶⁹ On indispensable parties, see *Pioche Mines Consol. v. Fidelity-Philadelphia Trust Co.*, 202 F.2d 944 (9th Cir. 1953); *Ward v. Deavers*, 203 F.2d 72 (D.C. Cir. 1953); *Cha-Toine Hotel Apartments Bldg. Corp. v. Shogren*, 204 F.2d 256 (7th Cir. 1953).

⁶⁸ See Note, *Federal Rules: Third Party Practice: Jurisdictional Requirements*, 5 Okla. L. Rev. 490 (1952).

⁶⁹ See, e.g., *United States v. De Haven*, 13 F.R.D. 435 (W.D. Mich. 1953); *Brown v. First Nat. Bank*, 14 F.R.D. 339 (E.D. Okla. 1953); *RFC v. Duke*, 14 F.R.D. 265 (D. Md. 1953).

⁷⁰ *Texas Eastern Transmission Corp. v. Standard Accident Ins. Co.*, 13 F.R.D. 324 (M.D. Tenn. 1952), 37 Minn. L. Rev. 634 (1953).

⁷¹ N.Y. Civ. Prac. Act § 193-a(4). See Comment, *Third-Party Practice in New York*, 37 Cornell L.Q. 721, 736 (1952).

⁷² *New Jersey v. New York*, 345 U.S. 369, 373 (1953).

inconvenience caused the Court would be slight as compared to the possible loss to Philadelphia.⁷⁸

III

PRE-TRIAL AND TRIAL PRACTICE

Pre-Trial Conferences.—As usual the year produced a fair amount of material on the pre-trial conference.⁷⁴ Particularly helpful are the many hints contained in the manual of *Pre-Trial Practice* published by the New Jersey Supreme Court and the elaborate statement of the Pre-Trial Committee of the Judicial Conference.⁷⁵

*Discovery.*⁷⁶—In *United States v. Reynolds*⁷⁷ the Supreme Court passed on an important aspect of privilege under Federal Rule 34.⁷⁸ In a civil case against the United States under the Federal Tort Claims Act, the Secretary of the Air Force refused to produce certain documents for determination of their privileged or nonprivileged nature. As a consequence, the facts were taken as established in the plaintiff's favor and judgment was entered against the Government.⁷⁹ The Supreme Court, while recognizing the privileged status of military secrets and the determination thereof as a judicial function, nevertheless reversed.⁸⁰ Drawing on the privilege against self-incrimination as an analogy, the Court applied a "formula of compromise," so

⁷⁸ *Clark v. Sandusky*, 205 F.2d 915 (7th Cir. 1953) seems an unusual extension of intervention as of right. Fed. Rule 24(a)(2) authorizes intervention of right "when the representation of the applicant's interests by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action." The latter requirement seems entirely lacking in the case, yet the court allowed intervention as of right.

⁷⁴ Crary, *The Pretrial in Action*, 37 Iowa L. Rev. 341 (1952); Hilton, *Pre-Trial Preparation and Pre-Trial Conferences in a Questioned Document Case*, 27 Tulane L. Rev. 473 (1953); Holtzoff, *Pretrial Procedure in the District of Columbia*, 3 Cath. U. of Am. L. Rev. 1 (1953); Tilbury, *Pre-Trial Conference in the Kansas City Area*, 21 U. of Kan. City L. Rev. 77 (1952).

⁷⁶ Murrah, *Pre-Trial Procedure*, 14 F.R.D. 417 (1953).

⁷⁹ See generally Hawkins, *Discovery and Rule 34: What's So Wrong About Surprise?*, 39 A.B.A.J. 1075 (1953); Note, *Discovery of Insurance*, 5 Stan. L. Rev. 322 (1953).

⁷⁷ 345 U.S. 1 (1953), 28 N.Y.U.L. Rev. 1188, 21 Geo. Wash. L. Rev. 792.

⁷⁸ "Upon motion of any party showing good cause therefor . . . the court in which an action is pending may . . . order any party to produce and permit the inspection and copying or photographing . . . of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, *not privileged*, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b) and which are in his possession, custody, or control. . . ." (Emphasis supplied.)

⁷⁹ The United States Court of Appeals for the Third Circuit affirmed in *Reynolds v. United States*, 192 F.2d 987 (3d Cir. 1951), 65 Harv. L. Rev. 1445 (1952), 36 Minn. L. Rev. 546 (1952), 30 Texas L. Rev. 889 (1952), 100 U. of Pa. L. Rev. 917 (1952).

⁸⁰ *United States v. Reynolds*, 345 U.S. 1 (1953). Justices Black, Frankfurter and Jackson dissented "substantially for the reasons set forth in the opinion of Judge Maris below." Id. at 12.

as not to force a disclosure (to the trial court) of the very thing the privilege was designed to protect. In the instant case, the majority believed that, after the formal claim of privilege by the Secretary of the Air Force, "under circumstances indicating a reasonable possibility that military secrets were involved, there was certainly a sufficient showing of privilege to cut off further demand for the documents on the showing of necessity for its [sic] compulsion that had then been made."⁸¹ The Court did concede that the claim of privilege should not be "lightly accepted" against a "strong showing of necessity."⁸²

Apparently the Supreme Court has rejected the contention, frequently made by the Government,⁸³ that the executive department's claim of privilege is conclusive as in England. Determination of privilege is clearly a judicial function. However, the scope of the privilege should be determined in each case by balancing the public interest in keeping certain information secret against the litigant's need for the information. Even the most compelling need, of course, "cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake." Whether or not "official information," not amounting to state secrets, is to be considered as equally privileged, has yet to be determined. Although the Government has frequently asserted a general "housekeeping" privilege, the courts have rarely allowed this in civil actions against the Government.⁸⁴

Federal Rule 34 authorizes a court to order discovery of relevant documents in the "possession, custody, or control" of an opposing party and, if the order is disobeyed, the court (under Rule 37[b]) may dismiss, strike his pleadings or impose other "just" sanctions. Even an income tax return of a party⁸⁵ or of a third person,⁸⁶ if under

⁸¹ *Id.* at 10-11.

⁸² The Court thought the necessity "dubious" in the instant case, since the Government offered to produce surviving crew members for examination by plaintiffs. The essential facts might well have been ascertained without resort to military secrets.

⁸³ See 40 Ops. Att'y Gen. 45 (1941); 25 Ops. Att'y Gen. 326 (1905); 13 Ops. Att'y Gen. 539 (1871).

⁸⁴ Cf. Model Code of Evidence, Rule 228(2) (1942): "A witness has a privilege to refuse to disclose a matter on the ground that it is official information, and evidence of the matter is inadmissible if the judge finds that the matter is official information, and (a) disclosure is forbidden by an Act of the Congress of the United States or a statute of this State, or (b) disclosure of the information in the action will be harmful to the interests of the government of which the witness is an officer in its governmental capacity."

⁸⁵ See 4 Moore, Federal Practice 1168 (2d ed. 1950). Cf. *Maddox v. Wright*, 103 F. Supp. 400 (D.D.C. 1952), 37 Minn. L. Rev. 399 (1953), 4 Moore, Federal Practice 1168 n.25 (Supp. 1952).

⁸⁶ *Mullen v. Mullen*, 14 F.R.D. 142 (D. Alaska 1953).

a party's control, may be compelled under these provisions. Suppose, however, disclosure of a document is forbidden by foreign law controlling the activities of its national; will production nevertheless be compelled? In a current case,⁸⁷ a district court ordered production of such documents in Switzerland and, even after Swiss authorities "constructively seized" the records to prevent compliance, dismissed the party's complaint with prejudice unless the records were produced within three months. The court was undoubtedly fearful lest foreign law "frustrate" domestic rules of procedure, which apply to foreign litigants seeking relief here. Conceding also the danger of collusion, it seems harsh to subject a party to such a sanction when it is trying in good faith to procure the documents.⁸⁸

Recent cases illustrate well some of the protective devices utilized by the courts to prevent undue expense and other kinds of unfairness in the use of discovery. This is particularly necessary where travel to or from a distant place is required.⁸⁹

Trial.—Despite substantial authority to the contrary,⁹⁰ the seventh circuit maintained that a plaintiff had an absolute right of dismissal under Federal Rule 41(a)(2),⁹¹ subject only to the court's discretion as to terms and conditions.⁹² In *Grivas v. Parmelee Transportation Co.*,⁹³ however, the court of appeals of that circuit has reached the conclusion that "our interpretation . . . was too broad and that . . . the allowance of a motion to dismiss under Rule 41(a)(2) is not a matter of absolute right—that it is discretionary with the court 'upon such terms and conditions as the court deems proper.'" The court, in modifying its previous ruling, held that the district court had power to exercise its discretion on such a motion, even though the case had been removed to the federal court and, as a result of a

⁸⁷ *Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. McGranery*, 111 F. Supp. 435 (D.D.C. 1953), 66 Harv. L. Rev. 1316. See also Note, 62 Yale L.J. 1248 (1953).

⁸⁸ The records were not produced within the period specified and the action has been dismissed with prejudice, 19 Fed. R. Serv. 37b.243 (1953).

⁸⁹ *Taejon Bristle Mfg. Co. v. Omnex Corp.*, 13 F.R.D. 448 (S.D.N.Y. 1953) (in an action for \$8,730 by a Korean corporation, defendant's examination of plaintiff's officers in Korea limited to written interrogatories); *Branyan v. Koninklijke Luchtvaart Maatschappij*, 13 F.R.D. 425 (S.D.N.Y. 1953) (oral examination under letters rogatory, directed to courts of India, granted to plaintiffs; each side to pay own expenses).

⁹⁰ See, e.g., *Barnett v. Terminal R.R. Ass'n*, 200 F.2d 893 (8th Cir.), cert. denied, 345 U.S. 956 (1953); *Moore v. C. R. Anthony Co.*, 198 F.2d 607 (10th Cir. 1952).

⁹¹ Fed. R. Civ. P. 41(a)(2) provides: "(a) Voluntary Dismissal: Effect Thereof . . . (2) By Order of Court. Except as provided in paragraph (1) . . . an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. . . ."

⁹² *Bolten v. General Motors Corp.*, 180 F.2d 379 (7th Cir. 1950).

⁹³ 207 F.2d 334, 336 (7th Cir. 1953).

favorable ruling to plaintiff, the removing defendant was deprived of a federal trial.⁹⁴

Comment on the Supreme Court's decision in *Johnson v. New York, N. H. & H. R.R.*⁹⁵ has been largely unfavorable. Although in terms the decision merely forbids an appellate court from entering judgment *n.o.v.* in the absence of an express and a precise motion therefor—at best, an “abracadabra of obedience” to Rule 50(b)⁹⁶—it is possible that the same rule may be applied in the trial courts. Thus far the lower federal courts have held that the trial judge has power to enter judgment *n.o.v.* (in the absence of an express motion) where decision on the motion for a directed verdict was expressly reserved.⁹⁷ Unfortunately, a dictum in the *Johnson* case seems to indicate that the trial judge will also be precluded in the absence of a renewal of the motion.⁹⁸ This may mean that, if argument on the motion is postponed until after the ten-day postverdict period has elapsed, the judge would lose his power to grant the preverdict motion and, at the same time, counsel would be too late in making a motion for judgment *n.o.v.* Certainly it would seem absurd to require counsel to make a motion for judgment while the original motion was still to be heard.⁹⁹

⁹⁴ In *Harvey Aluminum, Inc. v. American Cyanamid Co.*, 203 F.2d 105 (2d Cir.), cert. denied, 345 U.S. 964 (1953), the court refused to permit a voluntary dismissal without a court order after a hearing on plaintiff's motion for a temporary injunction, even though no “answer” or “motion for summary judgment” had been filed. See Fed. R. Civ. P. 41(a)(1). Moreover, the court would not allow a dismissal against one defendant, since only an “action,” not a “claim,” may be voluntarily dismissed. To eliminate a party, the remedy is a motion to drop the party, not voluntary dismissal.

⁹⁵ 344 U.S. 48 (1952), 28 N.Y.U.L. Rev. 438 (1953), 38 Cornell L.Q. 449 (1953), 41 Geo. L.J. 249 (1953), 21 Geo. Wash. L. Rev. 818 (1953), 51 Mich. L. Rev. 1087 (1953), 25 Rocky Mt. L. Rev. 243 (1953), 31 Texas L. Rev. 913 (1953), 6 Vand. L. Rev. 791 (1953). The case is discussed in 1952 Annual Surv. Am. L. 692, 28 N.Y.U.L. Rev. 782 (1953).

⁹⁶ Id. at 57 (Mr. Justice Frankfurter's dissent).

⁹⁷ See, e.g., *Stevens v. G. L. Rugo & Sons*, 115 F. Supp. 61 (D. Mass. 1952), rev'd, 209 F.2d 135 (1st Cir. 1953); *Mullen v. Fitz Simons & Connell Dredge & Dock Co.*, 11 F.R.D. 348 (N.D. Ill. 1950), modified, 191 F.2d 82 (7th Cir.), cert. denied, 342 U.S. 888 (1951); *Kline v. Yokem*, 117 F.2d 370 (7th Cir. 1941).

⁹⁸ See *Johnson v. New York, N.H. & H.R.R.*, 344 U.S. 48, 53 (1952): “The requirement for timely motion after verdict is thus an essential part of the rule, firmly grounded in principles of fairness. . . . Poor support for its abandonment would be afforded by the mere fact that a judge makes an express reservation of a decision which the rule reserves regardless of what the judge does.”

⁹⁹ In *Stevens v. G. L. Rugo & Sons*, 115 F. Supp. 61 (D. Mass. 1952), rev'd, 209 F.2d 135 (1st Cir. 1953), decided after the *Johnson* case, supra note 98, the trial judge expressly reserved decision on a motion for a directed verdict made by defendant and, after a verdict for plaintiff, awarded judgment *n.o.v.* to defendant in the absence of an express motion therefor. The court said, “Nothing decided” in the *Johnson* case “is to the contrary. . . . It is true that some dicta of Mr. Justice Black refer to the

Two decisions emphasize the need of proper and adequate findings in nonjury cases. According to the Supreme Court, the difficulty of distinguishing between law and fact "does not absolve district courts of their duty in hard and complex cases to make a studied effort toward definiteness. Statements conclusory in nature are to be eschewed in favor of statements of the preliminary and basic facts on which the District Court relied."¹⁰⁰ Moreover, findings of fact and conclusions of law should not be commingled with the "observations and arguments of the judge writing the opinion," since this practice easily leads to inadequate findings.¹⁰¹ Hardly a year passes without some such recommendations to the district courts and yet the warnings have frequently gone unheeded.

IV

JUDGMENT¹⁰²

Costs.—Federal decisions on this topic are comparatively rare, but much remains to be said by way of constructive comment and suggestion.¹⁰³ In what seems to be the first case in which a motion to retax costs was made since the adoption of the Federal Rules, Judge Chesnut took occasion to review the federal law on the subject. He concluded that the allowance of costs is discretionary with the court, although in practice proper taxable items will be granted the prevailing party.¹⁰⁴

Collateral Estoppel.—The doctrine of res judicata has often been applied to tax cases but the dangers are apt to be most serious where income taxes are levied annually. It is one thing to apply the aspect of a "bar" or "merger" to a cause of action already litigated, but where the subsequent suit is upon a different cause of action, albeit between the same parties, only matters actually determined should be

power of a trial judge, but his attention was not focussed on a case where the trial judge had actually acted, and no one had been procedurally surprised." Id. at 62.

¹⁰⁰ *Dalehite v. United States*, 346 U.S. 15, 24 n.8 (1953). The case is discussed in detail in the Survey article on Administrative Law, 29 N.Y.U.L. Rev. 101, 121 (1954).

¹⁰¹ *Koehler v. United States*, 200 F.2d 588, 592 (7th Cir. 1953).

¹⁰² See generally Asbill & Snell, Summary Judgment under the Federal Rules—When an Issue of Fact is Presented, 51 Mich. L. Rev. 1143 (1953); Pugh, The Federal Declaratory Remedy: Justiciability, Jurisdiction and Related Problems, 6 Vand. L. Rev. 79 (1952); Note, Declaratory Judgment and Matured Causes of Action, 53 Col. L. Rev. 1130 (1953).

¹⁰³ Note, Use of Taxable Costs to Regulate the Conduct of Litigants, 53 Col. L. Rev. 78 (1953); Ehrenzweig, Shall Counsel Fees Be Allowed?, 26 Calif. St. B.J. 107 (1951); Goodhart, Current Judicial Reform in England, 27 N.Y.U.L. Rev. 395, 405 (1952).

¹⁰⁴ *Hansen v. Bradley*, 114 F. Supp. 382 (D. Md. 1953), discussing various items of taxable costs.

res judicata (here called "collateral estoppel" or "estoppel by judgment"). Suppose a taxpayer and the Government consent to a judgment establishing that no tax deficiency is due for certain years, after previously disputing the depreciation basis of the taxpayer's property; will collateral estoppel operate to preclude re-examination of the basis in later years? The danger is that a consent judgment may be based on issues never determined on the merits and collateral estoppel "would [then] become a device by which a decision not shown to be on the merits would forever foreclose inquiry into the merits." Moreover, such agreements would rarely be made if considered a bar. Accordingly, while indicating that such a judgment might serve as a basis for collateral estoppel when shown to be an adjudication of the merits,¹⁰⁵ the Supreme Court recently decided that, in the absence of such a showing, collateral estoppel would not apply.¹⁰⁶ The judgment "has no greater dignity, so far as collateral estoppel is concerned, than any other judgment entered only as a compromise of the parties."¹⁰⁷

V

APPELLATE PROCEDURE¹⁰⁸

Hearings before Courts of Appeals.—In a decision¹⁰⁹ which, according to a dissenting justice, "will either be ignored or . . . will be regretted," the Supreme Court considered the procedure for convening a court of appeals *en banc*. Section 46(c) of the Judicial Code provides for hearings by divisions of three judges "unless a hearing or rehearing before the court *en banc* is ordered by a majority of the circuit judges of the circuit who are in active service." To what extent does this provision entitle a litigant to ask each member of the court for a hearing or rehearing *en banc*? The Supreme Court rejected the notion that Section 46(c) is addressed to litigants; the provision rests in the court the power to order hearings or rehearings *en banc*. Any other interpretation would mean an "automatic, second appeal to each litigant" in any court of appeals composed of more

¹⁰⁵ Cf. *Commissioner v. Sunnen*, 333 U.S. 591 (1948).

¹⁰⁶ *United States v. International Building Co.*, 345 U.S. 502 (1953), 52 Mich. L. Rev. 303. The case is discussed in Note, *The Supreme Court*, 1952 Term, 67 Harv. L. Rev. 91, 167 (1953).

¹⁰⁷ *Id.* at 506. If the parties had actually stipulated as to the depreciation basis, would re-examination of this fact be permitted in the subsequent suit? Cf. Note, 52 Col. L. Rev. 647 (1952).

¹⁰⁸ The controversy surrounding appellate jurisdiction under Rule 54(b), 1951 Annual Surv. Am. L. 794; 1952 Annual Surv. Am. L. 694, 28 N.Y.U.L. Rev. 784 (1953), has abated somewhat but comments and recommendations continue to pour in. See Notes, 28 N.Y.U.L. Rev. 203 (1953), 62 Yale L.J. 263 (1953).

¹⁰⁹ *Western Pac. R.R. Corp. v. Western Pac. R.R. Co.*, 345 U.S. 247 (1953). See Note, 22 U. of Cin. L. Rev. 476, 478 (1953).

than three judges, thus casting an additional burden on the court. Said the Supreme Court:

The statute deals, not with rights, but with power. The manner in which that power is to be administered is left to the court itself. A majority may choose to abide by the decision of the division by entrusting the initiation of a hearing or rehearing *en banc* to the three judges who are selected to hear the case. On the other hand, there is nothing in § 46(c) which requires the full bench to adhere to a rule which delegates that responsibility to the division. Because § 46(c) is a grant of power, and nothing more, each Court of Appeals is vested with a wide latitude of discretion to decide for itself just how that power shall be exercised.¹¹⁰

The opinion of the Court makes it clear that each court of appeals must adopt such means as will enable its full membership to determine whether its administration of the power achieves the statutory purpose. Also essential is that litigants be left free to "suggest" that a particular case warrants a rehearing before the full bench.¹¹¹ This latter requirement was particularly vexing to dissenting Justice Jackson, who believed that *en banc* hearings should be initiated by the judges *sua sponte* and that the entire problem was best left to each individual circuit.

It will be interesting to see what procedure is followed by each circuit as a result of the Supreme Court's decision. So long as no district judges sit with the circuit judges in the first and fourth circuits, no problem will arise there.¹¹² The third¹¹³ and ninth circuits¹¹⁴ have recently indicated the procedure each intends to follow. The busy Court of Appeals for the Second Circuit, which apparently never sits *en banc*, has not yet indicated what, if any, changes it will make in its present procedure.¹¹⁵

*The United States Supreme Court.*¹¹⁶—The *Rosenberg* case is now history. Although it is, and probably will remain, a *cause célèbre* because of ethical and political issues involved, writers on the judicial process will surely find much for dramatic comment in years to come. Procedurally, the case had "everything," reaching the Supreme Court

¹¹⁰ Id. at 259.

¹¹¹ "Counsel's suggestion need not require any formal action by the court; it need not be treated as a motion; it is enough if the court simply gives each litigant an opportunity to call attention to circumstances in a particular case which might warrant a rehearing *en banc*." Id. at 262.

¹¹² Each of these circuits has only three judges. 28 U.S.C. § 44(a) (Supp. 1952).

¹¹³ *Maris, Hearing and Rehearing Cases in Banc*, 14 F.R.D. 91 (1953).

¹¹⁴ Rule 23, United States Court of Appeals, 9th Circuit.

¹¹⁵ See Comment, 5 Stan. L. Rev. 332 (1953).

¹¹⁶ See Harper & Etherington, *Lobbyists before the Court*, 101 U. of Pa. L. Rev. 1172 (1953); Stern, *Denial of Certiorari Despite a Conflict*, 66 Harv. L. Rev. 465 (1953).

on no less than eight occasions.¹¹⁷ Late in 1952 the Court denied certiorari¹¹⁸ and rehearing,¹¹⁹ Mr. Justice Frankfurter taking pains to explain the meaning of a denial of certiorari and the lack of power to revise a death sentence. On May 25, 1953, the Court again denied certiorari,¹²⁰ this time on the affirmance of the court of appeals denial of a motion under Section 2255 of the Judicial Code.¹²¹ On June 15, 1953, the last day of the term, the Court denied oral argument on a motion for a stay of execution (made to Mr. Justice Jackson and referred to the full Court) and also denied a motion for a stay pending review of two other decisions under Section 2255.¹²² Four justices voted for oral argument, four for a stay.¹²³ On the same day, after the term expired, a petition for an original writ of habeas corpus was filed in the Supreme Court and this was denied in a special term convened that afternoon.¹²⁴ On June 17, Mr. Justice Douglas granted a stay,¹²⁵ which led to the historic reconvening of the Court on June 18 and an order vacating the stay.¹²⁶ The Court did "not doubt that Mr. Justice Douglas had power to issue the stay"¹²⁷ but found the question (raised for the first time by counsel who had never participated in the case) without merit. Three justices dissented.¹²⁸ The following day the Court denied two more motions seeking a stay,¹²⁹ one to allow time to seek executive clemency, the other to reconsider the Court's power to vacate Mr. Justice Douglas's stay. The case was closed, and that night the Rosenbergs were executed.

The above summary does not indicate all the moves and decisions made in the lower federal courts nor the details of various peti-

¹¹⁷ For a more detailed discussion of these steps and other aspects of the case, see Constitutional Law and Civil Rights in this Survey. 29 N.Y.U.L. Rev. 54, 56 (1954). See also a recent book, Fineberg, *The Rosenberg Case: Fact and Fiction* (1953); Note, 54 Col. L. Rev. 219 (1954).

¹¹⁸ 344 U.S. 838 (1952), refusing to review 195 F.2d 523 (2d Cir. 1952).

¹¹⁹ *Id.* at 889.

¹²⁰ 345 U.S. 965 (1953).

¹²¹ 200 F.2d 666 (2d Cir. 1952), affirming 108 F. Supp. 798 (S.D.N.Y. 1952).

¹²² 345 U.S. 989 (1953).

¹²³ Justices Jackson, Frankfurter and Burton voted for oral argument, but unless it was granted, only the first two voted for the stay; Justices Black and Douglas voted for the stay but, barring that, only the former agreed to oral argument.

¹²⁴ 346 U.S. 271 (1953). Mr. Justice Black dissented; Mr. Justice Frankfurter voted for oral argument.

¹²⁵ *Id.* at 313.

¹²⁶ *Id.* at 273 et seq.

¹²⁷ In a later opinion filed by Mr. Justice Clark, with whom Chief Justice Vinson and Justices Reed, Jackson, Burton and Minton joined, 346 U.S. 273, 293 (1953), this was added, *inter alia*: "Nor did Mr. Justice Douglas lack the power and, in view of his firm belief that the legal issues tendered him were substantial, he even had the duty to grant a temporary stay." *Id.* at 294.

¹²⁸ Justices Black, Frankfurter and Douglas.

¹²⁹ 346 U.S. 322, 324 (1953). Mr. Justice Black dissented from both denials.

tions made to individual members of the Court. Perhaps the Supreme Court should have reviewed the case on the merits in 1952; perhaps it should not have vacated Mr Justice Douglas stay with "unseemly haste." These are questions for legal historians to debate. Yet, looking at the entire procedural history of the case, with its trial, appeals, motions, stays, decisions, opinions, dissents, concurrences, etc., one may venture the opinion that justice was done "according to law" and with none of the haste that characterizes some nations which criticize our democratic process.

In *Montgomery Building & Construction Trades Council v. Ledbetter Erection Co.*¹³⁰ the Supreme Court held that a judgment granting a temporary injunction in a labor dispute was not final and hence not reviewable under Section 1257 of the Judicial Code.¹³¹ Granting the usual rule, the decision here nevertheless seems unduly technical. Was not "the assertion by the state court [which granted the injunction] of power to act in an interlocutory way" final?¹³² If, as the dissent indicates, petitioner had sought mandamus or prohibition against the state judge, certainly a judgment denying such relief would have been final and reviewable. On the other hand, by compelling petitioner to await the final decree he is in effect deprived of review since the question becomes moot and nonreviewable.¹³³ Such staunch obedience to the "slithery" concept of finality creates undue hardship.¹³⁴

VI

EXTRAORDINARY REMEDIES

Mandamus.—Partly to alleviate hardships resulting from the final judgment rule, Congress has authorized the "Supreme Court and all courts established by Act of Congress . . . [to] issue all writs

¹³⁰ 344 U.S. 178 (1952). In a suit to enjoin picketing by labor organizations, an Alabama court entered a decree overruling a motion to dissolve a temporary injunction. The Alabama Supreme Court affirmed. 256 Ala. 678, 57 So.2d 112 (1951). The United States Supreme Court granted certiorari, but in the instant decision dismissed the writ as improvidently granted.

¹³¹ "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court. . . ." 28 U.S.C. § 1257 (Supp. 1952).

¹³² See dissent of Mr. Justice Douglas, 344 U.S. 178, 181 (1952).

¹³³ Is the public interest exception to the rule forbidding review of moot cases applicable in the federal courts? For a negative answer, see *Campbell Soup Co. v. Martin*, 202 F.2d 398 (3d Cir. 1953).

¹³⁴ The final judgment rule, however desirable, frequently works hardship in appeals to the courts of appeals. Judge Frank has proposed a legislative solution authorizing appeals from interlocutory orders, judgments or decrees in the discretion of the court of appeals. However, this has been rejected by the Judicial Conference. See Report of the Judicial Conference of the United States 203 (App. 1953). The problem is still being considered. See Report of the Proceedings of a Special Session of the Judicial Conference of the United States 15-16 (March 26-27, 1953).

necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."¹³⁵ Mandamus is the writ usually applied for, but rarely is it granted even if necessary to avoid substantial injustice.¹³⁶ Even where there is no appellate remedy or at best an inadequate one, most courts insist that a jurisdictional error be present.¹³⁷ Indeed, frequently the adequacy of appeal is ignored.¹³⁸

Although courts have often issued mandamus when trial by jury has been erroneously granted or denied,¹³⁹ two recent cases¹⁴⁰ in the first circuit indicate that even in this area some courts are cautious "lest we lay ourselves open to the charge of reaching out for a jurisdiction which we may think it too bad Congress has not seen fit to confer—this under the pretext of acting in aid of an appellate jurisdiction elsewhere granted to us."¹⁴¹

The strictness with which the Supreme Court views the use of extraordinary writs was recently manifested in *Bankers Life & Casualty Co. v. Holland*.¹⁴² The Court, in holding that mandamus was not an appropriate remedy for vacating a severance and transfer order entered on the ground of improper venue,¹⁴³ re-emphasized that the writs are intended to be used "only in the exceptional case where there is clear abuse of discretion or 'usurpation of judicial power'. . . ." ¹⁴⁴ Although prevention of "judicial inconvenience and hardship" resulting from the final judgment rule was urged as a basis for issuance of the writ, the Court did not look favorably upon that argument. Nevertheless, as the dissenting justices indicate, the Court's opinion seems to leave open "the question whether such a ruling by a district judge may be reviewed by mandamus . . . in cir-

¹³⁵ 28 U.S.C. § 1651(a) (Supp. 1952).

¹³⁶ See Note, Federal Court Review by Extraordinary Writ: A Clogged Safety Valve in the Final Judgment Rule, 63 Yale L.J. 105, 106, 111 (1953).

¹³⁷ See, e.g., *Carr v. Donohoe*, 201 F.2d 426 (8th Cir. 1953), refusing to issue mandamus to vacate an order of transfer (to a different district in the same circuit) under 28 U.S.C. § 1404(a) (Supp. 1952), stating that such a transfer "cannot in any way impair or defeat the jurisdiction of this Court"; *Kanatser v. Chrysler Corp.*, 199 F.2d 610 (10th Cir. 1952), cert. denied, 344 U.S. 921 (1953), 101 U. of Pa. L. Rev. 1083 (1953), granting a writ of certiorari to review an order awarding a new trial because the trial judge exceeded his jurisdiction by contravening Fed. R. Civ. P. 59(d).

¹³⁸ See, e.g., *American Airlines v. Forman*, 204 F.2d 230 (3d Cir. 1953).

¹³⁹ See, e.g., *Goldblatt v. Inch*, 203 F.2d 79 (2d Cir. 1953); *Canister Co. v. Leahy*, 191 F.2d 255 (3d Cir.), cert. denied, 342 U.S. 893 (1951); *Bereslavsky v. Klobb*, 162 F.2d 862 (6th Cir. 1947).

¹⁴⁰ *In re Chappell & Co.*, 201 F.2d 343 (1st Cir. 1953); *In re Previn*, 204 F.2d 417 (1st Cir. 1953).

¹⁴¹ *In re Chappell & Co.*, *supra* note 140, at 345.

¹⁴² 346 U.S. 379 (1953).

¹⁴³ 28 U.S.C. § 1406(a) (Supp. 1952).

¹⁴⁴ 346 U.S. 379, 383 (1953).

cumstances where postponement of review would involve a protracted trial, entailing heavy costs and great inconvenience."¹⁴⁵ Meanwhile, the courts of appeals continue to be sharply divided on the proper application of the writ.¹⁴⁶

Habeas Corpus.—The application of the federal writ of habeas corpus has indeed been "an untidy area of our law."¹⁴⁷ In years past several aspects of habeas corpus proceedings to review state convictions have merely served to create sharp conflict of opinion among the circuits.¹⁴⁸ During 1953 the Supreme Court resolved some of these issues.¹⁴⁹ Although the opinions of some justices likewise reveal considerable divergence in views among various members of the Court, the procedural holdings¹⁵⁰ can be summarized as follows:

(1) *Darr v. Burford*¹⁵¹ is still law: prior to applying for a federal writ, a state prisoner must exhaust all state remedies "by any available procedure," including application to the United States Supreme Court for certiorari. However, the prisoner is not required to exhaust state remedies twice.¹⁵² If the highest court of the state has already reviewed the merits of the issues on direct review and the United States Supreme Court has denied certiorari, the prisoner may apply for the federal writ without first asking the state courts for collateral relief.¹⁵³

(2) In considering an application for the federal writ, the district judge should give no weight to a denial of certiorari by the

¹⁴⁵ *Id.* at 388.

¹⁴⁶ Can papers labeled an "appeal" be accepted as a petition for mandamus? See *Zamore v. Goldblatt*, 201 F.2d 738 (2d Cir. 1953), answering in the negative. (Frank, J., dissenting).

¹⁴⁷ *Sunal v. Large*, 332 U.S. 174, 184 (1947) (Mr. Justice Frankfurter's dissent).

¹⁴⁸ *Rogge & Gordon, Habeas Corpus, Civil Rights, and the Federal System*, 20 U. of Chi. L. Rev. 509 (1953).

¹⁴⁹ The Court decided four cases: *Brown v. Allen*, *Speller v. Allen*, *Daniels v. Allen*, 344 U.S. 443 (1953), all involving attacks on the jury system of North Carolina, and *United States ex rel. Smith v. Baldi*, 344 U.S. 561 (1953), collaterally attacking a Pennsylvania conviction on due process grounds.

¹⁵⁰ For a discussion of the substantive questions involved in these cases, see the article on Constitutional Law and Civil Rights in this Survey. 29 N.Y.U.L. Rev. 88-89 (1954). See also Note, *The Supreme Court, 1952 Term*, 67 Harv. L. Rev. 91, 116 (1953).

¹⁵¹ 339 U.S. 200 (1950), affirming the exhaustion principle, including the "first-crack" policy.

¹⁵² *Brown v. Allen*, 344 U.S. 443, 447-50 (1953).

¹⁵³ Although the Supreme Court was not given the "first-crack" on direct review in *United States ex rel. Smith v. Baldi*, 344 U.S. 561 (1953), state remedies for collateral relief (including an unsuccessful petition for certiorari to the United States Supreme Court) were exhausted prior to application for the federal writ. Apparently, then, state remedies for collateral relief (including application for certiorari to the United States Supreme Court) must be exhausted if complete direct review has not been had or sought.

Supreme Court, except to the extent that reasons were expressed. The denial of certiorari in habeas corpus cases is "without substantive significance."¹⁵⁴ Stating the Court's opinion on this point, Mr. Justice Frankfurter chose to follow the usual rule in ordinary litigation, particularly where, as here, prisoners themselves draw many of the applications and rarely support them by full or clear records. Three justices, on the other hand, believed that the district judge should have discretion to give weight to the denial of certiorari depending on the adequacy of the record.¹⁵⁵

(3) In considering an application for the federal writ, the district judge may give weight to the state court adjudications. While a state court adjudication is not *res judicata*, obviously the federal judge will look at the record or beyond the record to see if federal constitutional rights have been violated. If he believes that the state court has fairly and adequately considered the facts, there need not be a plenary hearing on the federal application.¹⁵⁶

(4) Even though the lower federal courts had (in two cases) erroneously evaluated the Supreme Court's denial of certiorari, the Supreme Court was willing to review the constitutional issues without returning them to the lower courts for reconsideration in the light of the Court's present holding in "2" *supra*. In one case, however, the Court refused to consider the constitutional issues on the ground that the prisoner had failed to obtain appellate review in the highest state court due to his failure to file a timely record on appeal.¹⁵⁷

Space limitations do not permit further discussion of the various opinions in these four cases. Particularly interesting are the divergent views of Mr. Justice Frankfurter and Mr. Justice Jackson on the present use of the writ.¹⁵⁸ Significant also are the considerations

¹⁵⁴ See Mr. Justice Frankfurter's opinion in *Brown v. Allen*, 344 U.S. 443, 488 (1953). Justices Black, Douglas, Burton and Clark agreed on this point, but the latter two did not agree that the error in this regard was ground for reversal.

¹⁵⁵ *Id.* at 456-57. Mr. Justice Frankfurter's reply to this argument was that any exercise of discretion would usually be arbitrary since the reasons for denial of certiorari are rarely given. "The District Judge ordinarily knows painfully little of the painfully little we knew." *Id.* at 494.

¹⁵⁶ Apparently the Court was unanimous on this point.

¹⁵⁷ In *Daniels v. Allen*, companion case to *Brown v. Allen*, 344 U.S. 443, 482-87 (1953), it appears that the record in the highest state court had been filed one day late. Justices Frankfurter, Black and Douglas believed that habeas corpus should lie for "so complete a miscarriage of justice." *Id.* at 556-60.

¹⁵⁸ Mr. Justice Jackson, *id.* at 532, was concerned with recent extensions of the writ and the demoralizing effects on state courts. He also felt that the same issues raised on appeal should not be relitigated on habeas corpus. Accordingly, the Supreme Court's denial of certiorari should terminate the matter except for federal "jurisdictional" questions on which there was no state remedy or because the petitioner was prevented from taking or perfecting an appeal.

advanced by Mr. Justice Frankfurter to guide the district courts, since these may well influence procedures followed in those courts.¹⁵⁹

Although the writ of habeas corpus as a postconviction remedy has greatly expanded in recent years, current cases indicate other common uses of the writ.¹⁶⁰ In one important case,¹⁶¹ the Supreme Court reconsidered the scope of the writ in attacking court-martial convictions.¹⁶² Here, although earnestly urged to adopt the scope of review extended to civil cases, the Court refused. While admitting that the federal civil courts have a responsibility to protect against violations of constitutional rights, the Court added that it "is not the duty of the civil courts . . . to reexamine and reweigh each item of evidence of the occurrence of events which tend to prove or disprove one of the allegations in the applications for habeas corpus. It is the limited function of the civil courts to determine whether the military have given fair consideration to each of these claims."¹⁶³

With due deference to the Court, the view stated above can only lead to great difficulty at a time when millions of Americans, normally civilians, are performing military or naval service in peacetime. For all practical purposes, as long as the military tribunal has given fair consideration to the constitutional questions, its determinations, however erroneous, are conclusive. Certainly deference to the constitutional power of Congress to make rules for the armed forces does not require that the federal courts ignore violations of due process under the Fifth Amendment. Significant, too, is the question, as yet

¹⁵⁹ *Id.* at 500-08. For more complete comment on these cases, see Fraenkel, *Federal Habeas Corpus Jurisdiction to Review State Convictions*, 14 F.R.D. 99 (1953); Rogge & Gordon, *Habeas Corpus, Civil Rights, and the Federal System*, 20 U. of Chi. L. Rev. 509, 525 (1953); Note, *The Supreme Court, 1952 Term*, 67 Harv. L. Rev. 91, 116-18, 156-60 (1953).

¹⁶⁰ See, e.g., *Helkilla v. Barber*, 345 U.S. 229 (1953), limiting the scope of the writ in attacking a deportation order to enforcement of due process requirements.

¹⁶¹ *Burns v. Wilson*, 346 U.S. 137 (1953). Soldiers, sentenced to death after conviction for rape and murder, petitioned the District Court for the District of Columbia for habeas corpus, alleging illegal detention, use of involuntary confessions, suppression of evidence, perjury and denial of counsel of their choice. The district court dismissed without a hearing, limiting its review to traditional jurisdictional questions. The court of appeals affirmed but only after reviewing the merits and finding no denial of constitutional rights. The Supreme Court affirmed but did not approve the action of the court of appeals. Mr. Justice Frankfurter indicated that the case should be set down for reargument. *Id.* at 148. Justices Black and Douglas dissented, advocating a broad scope of review. Later, when petition for rehearing was denied, Mr. Justice Frankfurter filed a more detailed opinion in favor of reargument. 74 Sup. Ct. 3 (1953). Since this article was written, the soldiers have been hanged. See N.Y. Times, Jan. 28, 1954, p. 7, col. 6.

¹⁶² See Snedeker, *Habeas Corpus and Court-Martial Prisoners*, 6 Vand. L. Rev. 288 (1953); Note, *The Supreme Court, 1952 Term*, 67 Harv. L. Rev. 91, 160-62 (1953).

¹⁶³ *Burns v. Wilson*, 346 U.S. 137, 144 (1953).

not squarely answered by the Supreme Court, whether these American citizens imprisoned abroad (outside any judicial district) may petition for habeas corpus in the District of Columbia.¹⁶⁴ A recent district court case has answered in the affirmative,¹⁶⁵ but the issue is not free from doubt.¹⁶⁶

Coram Nobis.—In *United States v. Morgan*¹⁶⁷ a state prisoner, under sentence in New York as a second offender, applied to the federal district court for a writ of error *coram nobis*, claiming that a prior federal conviction was void (for denial of right to counsel) and should be vacated in order that he might be resentenced in the state court as a first offender. The Court of Appeals for the Second Circuit held that the application should not have been dismissed and, accordingly, remanded for a hearing. The question whether *coram nobis* is still available in the federal courts is, indeed, a troublesome one. Section 2255 of the Judicial Code provides for a motion¹⁶⁸ and, according to the reviser's note, "restates, clarifies and simplifies the procedure in the nature of the ancient writ of error *coram nobis*."¹⁶⁹ This section, however, as well as Federal Rule 60(b),¹⁷⁰ can be interpreted as applying *only* to federal prisoners and hence inapplicable here. Turning then to Section 1651(a), authorizing federal courts to issue "all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law,"¹⁷¹ a good argument can be made that *coram nobis* is still available.¹⁷² But

¹⁶⁴ See Perlman, Habeas Corpus and Extraterritoriality: A Fundamental Question of Constitutional Law, 36 A.B.A.J. 187 (1950); Wolfson, Americans Abroad and Habeas Corpus, 9 Fed. B.J. 142 (1948), 10 *id.* at 69.

¹⁶⁵ *Toth v. Talbott*, 113 F. Supp. 330 (D.D.C. 1953). The writ was sustained and the petitioner discharged. 114 F. Supp. 468 (D.D.C. 1953).

¹⁶⁶ See Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts, 66 Harv. L. Rev. 1362, 1396-1402 (1953).

¹⁶⁷ 202 F.2d 67 (2d Cir. 1953), 66 Harv. L. Rev. 1137. Contra: *United States v. Kerschman*, 201 F.2d 682 (7th Cir. 1953).

¹⁶⁸ 28 U.S.C. § 2255 (Supp. 1952) provides that a "prisoner in custody under sentence of a court established by Act of Congress" claiming a fundamental error "may move the court which imposed the sentence to vacate, set aside or correct the sentence. A motion for such relief may be made at any time." (Emphasis supplied.)

¹⁶⁹ 28 U.S.C. following § 2255 (Supp. 1952).

¹⁷⁰ Fed. R. Civ. P. 60(b), after providing that, on motion, a court may give relief from judgment for various reasons, states: "Writs of *coram nobis*, *coram vobis*, *audita querela*, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action." For the meaning of "by an independent action," see *United States v. Spadafora*, 207 F.2d 291 (7th Cir. 1953).

¹⁷¹ 28 U.S.C. § 1651(a) (Supp. 1952).

¹⁷² Query: has the writ of error *coram nobis* ever been available in the federal courts? Several lower court cases have allowed the remedy, but the writer has been unable to find a Supreme Court decision so holding.

is the writ "in aid of" the district court's jurisdiction when petitioner has already served his federal sentence? Is this writ "agreeable to the usages and principles of law," when a specific federal provision has abolished this remedy and substituted a motion which is not available to state prisoners? These are questions deserving an answer, and a decision by the Supreme Court will be welcome.¹⁷³

¹⁷³ Since this article was written, the Supreme Court, in a five-to-four decision, has affirmed. 74 Sup. Ct. 247 (1954). Thus "a motion in the nature of a writ of error coram nobis" is still available to state prisoners attacking a previous federal conviction.

CIVIL PROCEDURE IN STATE COURTS

DELMAR KARLEN AND GERALD MOSS

AS IN previous years, it is difficult to find a golden thread in the vast output of state cases dealing with civil procedure. Rightly or wrongly, the subject is considered by most lawyers and judges to be "local" and "technical." Hence there is little tendency to look beyond state borders, or to articulate the policy factors underlying decisions. One might even wonder from reading the cases whether the policy factors are even considered. Significant developments in this area are likely to be legislative rather than judicial in nature, taking the form either of statutes or general court rules governing procedure. Only rarely is a case found which is broadly significant in itself. Indeed most current cases are hardly more than footnotes to statutory material.

I

LEGISLATION AND RULE CHANGES

Louisiana has been in the throes of important procedural changes since the Legislature in 1948¹ instructed the State Law Institute² to prepare a revision of the Code of Practice. The proposed new Code has not yet been acted upon by the Legislature.

In the course of preparing the revision a prolonged debate centered around the merits of a system of "notice" pleading, as against a system of "fact" pleading. The determination as to which of these two systems should be recommended was fully and seriously debated for more than six months, with the final decision being in favor of the retention of "fact" pleading.³

Despite the tremendous impact that the Federal Rules generally

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¹ La. Rev. Stat. Ann. §§ 24:201-5 (West 1950). In § 24:204 the general purpose of the Institute was set out as follows: "to promote and encourage the clarification and simplification of the law of Louisiana and its better adaptation to present social needs; to secure the better administration of justice. . . ."

² This is an official advisory law-revision agency of the State of Louisiana. The Council of the Louisiana State Law Institute consists of lawyers, judges, members of the Legislature, law school faculty members and representatives of the executive department.

³ McMahon, *The Case against Fact Pleading in Louisiana*, 13 La. L. Rev. 369 (1953). Mr. McMahon is professor of law at Louisiana State University and reporter, Louisiana Code of Practice Revision, Louisiana State Law Institute.

have had upon the procedural philosophy of the states since 1938, only six states⁴ have adopted the pleading provisions of the Federal Rules⁵ without qualification. South Dakota has new procedural provisions which indicate a highly questionable rejection of "fact" pleading, if there be any rejection at all.⁶ In Texas there seemed to be an initial desire to be rid of "fact" pleading,⁷ but the Rules of Civil Procedure now in effect⁸ indicate that the requirements of "fact" pleading probably are still maintained.

Other states⁹ which have adopted new rules of procedure in recent years, or which have amended their procedural codes and statutes in order to assimilate many provisions of the Federal Rules, nevertheless have preserved some requirement that the "facts" or that the "cause of action" be pleaded.

Returning to Louisiana, the most controversial decision in drafting the new Code of Practice was to determine whether "fact" pleading should be retained or eliminated. As distinguished from other states where only "fact" pleading and the provisions of the Federal Rules compete for acceptance, in Louisiana there were three alternatives. The reporter in charge of the revision relating to pleading, presented the following three plans to the Council:

- a) the return to the simplified pleading under the Livingston Code of 1825;
- b) the adoption of the notice pleading of the Federal Rules of Civil Procedure;
- c) the retention of the present system of fact pleading. . . .¹⁰

⁴ Ariz. Code Ann. § 21-404 (1939); Colo. R. Civ. P. 8(a); Del. R. Civ. P. 8(a); Minn. R. Civ. P. 8(1); N.M.R. Civ. P. 8; Utah R. Civ. P. 8(a).

⁵ The key provision of the Federal Rules of Civil Procedure, Rule 8(a), states: "A pleading which sets forth a claim for relief . . . shall contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief. . . ." Because of this provision, it is frequently, but loosely, asserted that the Federal Rules inaugurate a system of "notice" pleading. See Clark, "Clarifying" Amendments to the Federal Rules?, 14 Ohio St. L.J. 241, 245 (1953).

⁶ S.D. Code tit. 33:0908 (1939) provides that "[n]o technical forms of pleading or motion are required," but tit. 33:0903 provides: "A pleading which sets forth a claim for relief . . . shall contain: (1) A plain statement of the claim constituting the cause of action. . . ."

⁷ The effect of certain proposed rules of procedure would, it was said, end "the unworkable requirement of 'fact' pleading and the technicality incident to requirement of the statement of a 'cause of action.'" McDonald, Civil Rules Begin to Take Form, 3 Texas B.J. 179, 180 (1940).

⁸ Texas R. Civ. P. 45: "Pleadings . . . shall . . . (b) Consist of a statement in plain and concise language of the plaintiff's cause of action or the defendant's grounds of defense. . . ." Rule 47 states: "A pleading which sets forth a claim for relief . . . shall contain (a) a short statement of the cause of action sufficient to give fair notice of the claim involved. . . ."

⁹ Fla. R. Civ. P. 9(a), (b); Iowa R. Civ. P. 70; Mo. Stat. § 509.050 (1952); N.J.R. Civ. P. 4:8-1; Pa. R. Civ. P. 1019; Wash. Rev. Code § 4.32.040 (1951).

¹⁰ Tucker, Proposal for Retention of the Louisiana System of Fact Pleading; Expose des Motifs, 13 La. L. Rev. 395, 396 (1953).

Under the first alternative, the advocates of the return to the original simplicity of the Code of Practice of 1825 cited early cases decided before and after its enactment to sustain their position, which was stated thus:

Fair notice to the adversary was the primary objective of the pleadings, and if the adversary had such knowledge aliunde the pleadings, then the latter's insufficiencies could be disregarded. This is definitely *not* fact pleading, but a modified notice pleading in its most liberal aspects.¹¹

The opposition, conceding certain inconsistencies in the cases, nevertheless maintained:

But here there has been no deviation from the broad principles upon which Louisiana rules of pleading are based—the material facts, or the facts constituting the substance of the complaint and defense must be stated clearly and concisely, and the parties will not be allowed to prove that which is not alleged. And these principles have applied in Louisiana ever since the Practice Act of 1805.¹²

This view prevailed and the reporter's recommendation to return to the original simplicity of the Code of 1825 was rejected.

The second proposal was to adopt "notice" pleading modeled on the Federal Rules. Here, the controversy was less sharp, because those in favor of "notice" pleading had concentrated their efforts on re-establishing the nineteenth-century code practice. Firm support for the Federal Rules never materialized because there was strong opposition to any procedural change not requiring that "facts" constituting a "cause of action" be set forth in the pleadings. Accompanying this was a feeling that the successful operation of the Federal Rules depended upon extensive use of discovery procedures, which, it was thought, would cause an unjustified expense in Louisiana where the great bulk of cases in the state courts involved small amounts.¹³

In spite of this feeling, the pre-trial¹⁴ and discovery¹⁵ procedures of the Federal Rules were approved in substance, thus reaffirming the prior statutory rules.¹⁶ So was a provision to permit amendments to conform the pleadings to the evidence, substantially patterned after Rule 15 of the Federal Rules.¹⁷ But Federal Rule 8(a) was rejected as it has been in other states noted above.

¹¹ McMahon, *supra* note 3, at 381. The reporter admitted that under the 1825 Code the pleading of some facts was required, but argued that no mention was made of "ultimate facts" or the pleading of "full factual particulars," and that there was no express prohibition against pleading conclusions of law.

¹² Tucker, *supra* note 10, at 411.

¹³ McMahon, *supra* note 3, at 393.

¹⁴ La. Rev. Stat. Ann. § 13:5151 (Supp. 1954).

¹⁵ La. Rev. Stat. Ann. §§ 13:3741-94 (Supp. 1954).

¹⁶ See Tucker, *supra* note 10, at 436.

¹⁷ Article 71 of the Proposed Code of Louisiana which is substantially the same as

It is interesting to note that the conflict over the merits of the above-mentioned rule is not confined to the states. All is not quiet on the federal front. In 1952, at the Judicial Conference of the Judges of the Ninth Circuit, a resolution was adopted recommending an amendment to Rule 8(a)(2) of the Federal Rules which would require the claim for relief to include a statement of the "facts" constituting a "cause of action."¹⁸

One of the most ambitious undertakings in the field of state civil procedure noted in 1953 is in connection with proposed rules of civil procedure for Missouri. These rules are the result of the work of the Civil Practice and Procedure Committee of the Supreme Court of Missouri, which is currently awaiting criticisms and suggestions from members of the bar, and other interested persons.

Some idea as to the scope of the revision may be determined from the following paragraph:

Upon becoming effective these rules will supersede all procedural provisions in the statutes and Supreme Court Rules having reference to process, service, venue, parties, pleading, discovery, procedure (both before and at the trial), referees and receivers, judgments and after trial motions, execution, appeal, appellant procedure, attachment, condemnation, declaratory judgments, divorce and alimony, ejectment, garnishment and sequestration, extraordinary legal remedies, land titles, change of name, partition and replevin. This opens up the entire question of what is substantive law and what is procedural.¹⁹

Other rule changes, proposed or accomplished, are described in the article on Judicial Administration in this *Annual Survey of American Law*.²⁰

II

JURISDICTION

Most of the inroads which have been made upon the doctrine of *Pennoyer v. Neff*²¹ have come through legislative action. The role of the courts in revising old concepts of jurisdiction has been a rather passive one, limited to approving (in some instances only, of course) what legislatures have done in the way of extending jurisdiction over nonresident motorists, nonresidents doing business in the state and others who normally cannot be served with process within the state borders.

Fed. R. Civ. P. 15(b): "Such amendment of the pleadings as may be necessary to cause them to conform to the evidence . . . may be made upon motion of any party at any time. . . ."

¹⁸ Claim or Cause of Action, 13 F.R.D. 253 (1953) (a discussion on whether there is need for amendment of Fed. R. Civ. P. 8[a][2]).

¹⁹ Comment, 18 Mo. L. Rev. 280, 281 (1953). This article discusses most of the proposed rules, section by section.

²⁰ 28 N.Y.U.L. Rev. 155 (1953).

²¹ 95 U.S. 714 (1877).

A 1953 case in California seems to be an exception to this line of development, manifesting a more active judicial role. *Allen v. Superior Court*²² arose out of an auto accident which occurred in California in 1947, when the defendant resided there. Before the summons was served, but after the action was "commenced" by filing the complaint, he moved to Oregon. Pursuant to an order for service by publication obtained in a California court, he was personally served in Oregon with a summons and complaint. He appeared specially and moved to quash the summons and complaint. The trial court denied the motion, and when a writ of prohibition against further proceedings was sought in the Supreme Court of California, it was denied.

Service had been made under the provisions of Sections 412 and 413 of the California Code of Civil Procedure,²³ which antedated *Pennoyer v. Neff*. Although these sections apparently permitted personal service outside the state on nonresidents generally, they were never used to effect such service after the United States Supreme Court decided *Pennoyer v. Neff*. There was another section, 417, of the California Code²⁴ which at least came close to justifying jurisdiction in the instant case. It authorized personal service outside of the state upon a defendant who was a resident at the time of the "commencement" of the action. The statute seems to have been designed to take advantage of and perhaps go a little beyond *Milliken v. Meyer*.²⁵ That case upheld the validity of a personal judgment rendered against a Wyoming domiciliary who had been personally served with process in Colorado, pursuant to the applicable Wyoming statute. The Supreme Court said:

Domicile in the state is alone sufficient to bring an absent defendant within the reach of the state's jurisdiction for purposes of a personal judgment by means of appropriate substituted service.²⁶

Thus, the personal service outside the state brought the domiciliary

²² 259 P.2d 905 (Cal. 1953). The case is discussed by Ehrenzweig & Mills, *Personal Service Outside the State*, 41 Calif. L. Rev. 383 (1953).

²³ Section 412 provides in part: "Where the person on whom service is to be made resides out of the State; or has departed from the State . . . such court, or judge, may make an order that the service be made by the publication of the summons." Section 413 provides: "When publication is ordered, personal service of a copy of the summons and complaint out of the State is equivalent to publication and deposit in the post office."

²⁴ Cal. Code Civ. Proc. § 417 (1953): "Where jurisdiction is acquired over a person who is outside of this State by publication of summons in accordance with Sections 412 and 413, the court shall have the power to render a personal judgment against such person only if he was personally served with a copy of the summons and complaint, and was a resident of this State at the time of the commencement of the action or at the time of service."

²⁵ 311 U.S. 457 (1940).

²⁶ *Id.* at 462.

within the jurisdiction of the court and furnished adequate notice and opportunity to be heard, so as to satisfy the traditional notions of "fair play and substantial justice" implicit in due process.²⁷

In the *Allen* case, the California court, not being able to rely squarely on *Milliken v. Meyer*, or Section 417, or the nonresident motorist statute, had to find a constitutional basis for jurisdiction—partly at least—in the fact that the defendant was a resident of the state at the time the cause of action against him arose within the state.

Whether this is a permissible extension of the idea of *Milliken v. Meyer* eventually will have to be determined by the United States Supreme Court. It may be ventured, however, that the California decision is in line with the Supreme Court's willingness to replace the conceptualism of *Pennoyer v. Neff* with a more realistic approach to jurisdiction. Theories based upon "power" are giving way to a more forthright look into the realities of notice and the "reasonableness" of a state's assuming jurisdiction in a given type of case.

III

JOINDER OF PARTIES AND CLAIMS

A recent Ohio case illustrates how unwilling some courts are to proceed on their own initiative—by traditional common-law case development—toward a rational procedure. They seem to need legislative encouragement, guidance and even command.

In *Fielder v. Ohio Edison Co.*²⁸ the plaintiff, administrator of deceased's estate, combined an action for decedent's pain and suffering with one for his wrongful death. The Ohio Supreme Court, three judges dissenting, held that the two causes of action were improperly joined, under a statute requiring that united causes of action must affect all the parties to the action. Although there is statutory authority for permissive joinder of causes of action arising from the same transaction,²⁹ the following section of the Ohio Code was held an insuperable obstacle: "causes of action so united must . . . affect all the parties to the action."³⁰ In the opinion of the court, the administrator was not "affected" by the action. This is based upon the proposition that in Ohio an administrator brings a wrongful death action for the sole benefit of the surviving spouse and the next of kin, and therefore is a mere nominal party to the suit, without a "right of action."

The majority emphasized that the states which permit joinder in circumstances like those in the instant case have statutes expressly

²⁷ *International Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945).

²⁸ 158 Ohio St. 375, 109 N.E.2d 855 (1952).

²⁹ Ohio Gen. Code Ann. § 11306 (1938).

³⁰ *Id.* § 11307.

permitting such joinder.³¹ However, Nebraska law corresponds to the Ohio provision with respect to joinder, and yet permits the uniting of a personal injury and wrongful death action without the requirement of an enabling statute.³² Other jurisdictions having only general joinder statutes of the same orthodox type arrive at the same result.³³

The dissent reasoned that the administrator must of necessity be "affected" by the actions since he is the only person permitted, under the Ohio General Code, to institute a personal injury or wrongful death action. Thus, the Legislature must have intended the administrator as the only possible plaintiff to be "affected" by the two causes of action for the purposes of joinder. This would appear to be the more realistic and practical approach. Why two separate trials should be necessary in a situation where almost identical issues of fact and of law are to be litigated is hard to understand in a day of congested trial calendars.

This problem does not come up under the Federal Rules, or rules modeled after them,³⁴ where the formulation is as follows:

All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. . . . A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded.³⁵

IV

PLEADING

As indicated in the first section of this article, Federal Rule 8(a), substituting the requirement that a pleader need only state a claim upon which relief can be granted for the traditional requirement that he must state "ultimate facts" sufficient to constitute a "cause of action," is a highly controversial one. Where the idea

³¹ Compare N.Y. Decedent Estate Law § 120. This section provides in part that where a personal injury action has been brought and death results from the injury, the executor or administrator may amend the complaint to include the wrongful death action. It also provides that where a personal injury and wrongful death action are separately pending against the same defendant the two suits may be consolidated on the motion of either party.

³² See *Fielder v. Ohio Edison Co.*, 158 Ohio St. 375, 388, 109 N.E.2d 855, 862 (1952) (dissenting opinion); *Rasmussen v. Rasmussen*, 133 Neb. 449, 275 N.W. 674 (1937).

³³ See *Fielder v. Ohio Edison Co.*, *supra* note 32; *Nemecsek v. Filer & Stowell Co.*, 126 Wis. 71, 105 N.W. 225 (1905); *Tillar v. Reynolds*, 96 Ark. 358, 131 S.W. 969 (1910).

³⁴ See, e.g., N.Y. Civ. Prac. Act § 212.

³⁵ Fed. R. Civ. P. 20(a).

is accepted, however, its result is to produce a substantial de-emphasis of pleading. In a recent Illinois case, the same result was accomplished in reliance upon a kindred provision reading as follows: "Pleadings shall be liberally construed with a view to doing substantial justice between the parties."³⁶

In *Lustig v. Hutchinson*³⁷ plaintiff's complaint named as defendants an alleged principal and agent in a breach of contract action which sought damages solely from the principal. Beyond the agency allegation, the plaintiff made no charge against the agent either in the alternative or in a separate count.³⁸ Both defendants put in general denials. The sufficiency of the complaint was not challenged at the trial, where judgment subsequently was rendered for defendant principal and against defendant agent. The agent appealed, but the judgment was affirmed on the ground that the defect in pleading had been cured by failure to raise an objection thereto, and that the evidence supported the verdict. The majority indicated it was fully aware that the complaint would have been vulnerable to a timely motion to dismiss by the agent. According to the dissenting judge, objection should be permitted at any time to a complaint which fails to state a cause of action.

The reasoning of the majority was not that the statute quoted above eliminates the familiar rule that failure to state a cause of action can be raised at any time,³⁹ but rather that it gives broad scope to the doctrine of aider. In other words, pleadings alone have fulfilled their function by the time that the trial is over and no longer have controlling significance. What counts then is the evidence and the findings.

The result of a case like this is likely to be as much a matter of heated controversy as would be a formal rule change dispensing with the requirement that a cause of action be stated in the pleadings.

V

PRE-TRIAL AND DISCOVERY

Like many other procedural ideas, pre-trial conferences and discovery have their roots in judicial case-law practices, but come into

³⁶ Ill. Ann. Stat. c. 110, § 157 (1948).

³⁷ 349 Ill. App. 120, 110 N.E.2d 278 (1953).

³⁸ See Ill. Ann. Stat. c. 110, § 167(2) (1948), which provides in part that, where a party is unsure as to which of several statements is true, he may state them in the alternative. Another section, 148(3), provides for the alternative joinder of parties, and allows alternative claims to be stated in the same or separate counts.

³⁹ See *Gustafson v. Consumers Sales Agency, Inc.*, 414 Ill. 235, 110 N.E.2d 865 (1953). "It is apparent therefore, that although section 42(3) of the Civil Practice Act does not refer specifically to 'defects in substance,' nor state that if the defect amounts to a failure to state a cause of action it cannot be waived, nevertheless, this limitation has been engrafted upon section 42(3)." *Id.* at 243, 110 N.E.2d at 870.

significant large-scale operation only under the aegis of general rule-making by legislatures or courts functioning in a legislative capacity. There is precedent for these devices, and inherent power in courts functioning as courts to employ them and improve them. Yet the fact of the matter is that they are not importantly used until some general rule inaugurates them, nor improved until some general rule improves them.

This is neatly illustrated by recent experience in Louisiana. In 1950, that state after watching experiments in other jurisdictions, adopted its own pre-trial statute,⁴⁰ modeled closely after the federal rule. The statute was not employed to its fullest advantage because it was not accompanied by an adequate system of discovery. This shortcoming was recognized by the bench and bar, and it was predicted that pre-trial in Louisiana would be developed more fully if aided by an adequate discovery statute.⁴¹ Subsequently, a new act was passed by the Legislature last year providing litigants with broad facilities for discovery.⁴²

Similarly, in Georgia, it took a legislative act to inaugurate pre-trial conferences.⁴³ In New York, too, the inauguration of large-scale, state-wide pre-trial conferences awaits general rules on the subject. Such rules have been recommended by the Judicial Council of the state.⁴⁴

Apart from such legislative developments, the only significant activities in the areas of pre-trial and discovery have taken the form of studies on how the procedures are working.⁴⁵ Presumably such studies are made with a view to possible future legislative changes. As for current cases in these areas, they add little to the general picture, being concerned only with peripheral wrangling.⁴⁶

⁴⁰ La. Rev. Stat. Ann. §§ 13:5151-2 (1950).

⁴¹ Sarpy, *Pre-Trial in Louisiana*, 6 *Loyola L. Rev.* 105 (1952).

⁴² La. Rev. Stat. Ann. §§ 13:3741-94 (Supp. 1954).

⁴³ Ga. Laws 1953, c. 319, p. 269.

⁴⁴ 19 N.Y. Jud. Council Rep. 73 (1953).

⁴⁵ See Hugus, *Pre-Trial in West Virginia*, 55 *W. Va. L. Rev.* 110 (1953); Murray, *Pre-Trial Practice in Virginia*, 1 *Wm. & Mary Rev. of Va. L.* 157 (1953); Patterson, *Pre-Trial Procedure in Practice*, 41 *Ky. L.J.* 383 (1953).

⁴⁶ See, e.g., *Destin v. Bernhard Mayer Estate, Inc.*, 123 N.Y.S.2d 271 (Sup. Ct. 1953); *Fisher v. Glick*, 95 A.2d 464 (Del. Super. Ct. 1953) (dealing with the question of whether signed statements of plaintiff given to defendant's claim investigator can be inspected by plaintiff); *Reynolds v. Boston & Maine Transp. Co.*, 98 A.2d 157 (N.H. 1953) (dealing with the question of whether defendant can be compelled to furnish the names and addresses of bus passengers who witnessed an accident); *Gotthelf v. Hillcrest Lumber Co.*, 280 App. Div. 668, 116 N.Y.S.2d 873 (1st Dep't 1952) (dealing with the problem of whether a mechanical recording device can be used in place of a live court reporter to take down testimony in an examination before trial).

VI

DECLARATORY JUDGMENTS

The impact of declaratory judgment acts upon common-law conceptions as to remedies is well known. Whether they may also have an impact upon traditional ideas as to *res judicata* was the subject of decision in *Lane v. Page*.⁴⁷

Plaintiff, under the Colorado Declaratory Judgment Act,⁴⁸ had been declared to have the right to use a certain roadway and defendant had been enjoined from interfering with the plaintiff's use thereof. Subsequently plaintiff brought an action for damages caused by the defendant's obstructing the road prior to the bringing of the former action. Judgment for plaintiff was reversed on appeal, the court holding that since the claim for damages could have been asserted in the proceeding for a declaratory judgment, such judgment was a bar to the subsequent action.

The crucial question was whether the plaintiff, after the declaratory judgment, might assert the same operative facts upon which the decision was based and obtain coercive relief in a subsequent action. In answering in the negative, the court reasoned along traditional lines familiar in situations where only traditional coercive relief is sought: multiplicity would be encouraged if plaintiffs were permitted to bring successive actions predicated upon the same facts.

But should the plaintiff be required to seek coercive relief whenever his right to it has matured, and not be permitted to use the "milder remedy" of a simple declaration of rights? In the event that continued dealings are anticipated between the parties, a demand for coercive relief—damages or an injunction—might have a provocative effect, disrupting relationships. Why should not a plaintiff rely for his remedy on the defendant's good faith without foregoing his right to relief if the reliance proves unjustified?

The case seems to be contrary to the weight of authority⁴⁹ and to legislative intention.⁵⁰ It seems an example of a rather mechanical application of old ideas to a new problem, without a sufficient thinking out of possibly significant differences. At least it is fair to say that whatever quality of thinking went into the decision, the articulation of reasons to justify it is not sufficient.

⁴⁷ 126 Colo. 560, 251 P.2d 1078 (1952).

⁴⁸ Colo. R. Civ. P. 57.

⁴⁹ See 52 Mich. L. Rev. 141, 142 (1953).

⁵⁰ See Borchard, *Declaratory Judgments* 342 (2d ed. 1941). "Self-restraint, the willingness to invoke arbitration and declaration of rights instead of hostilities and coercion, is a mark of civilization and should be encouraged. . . ." See also Note, *Declaratory Judgment and Matured Causes of Action*, 53 Col. L. Rev. 1130, 1133 (1953).

VII

NEW TRIALS

In many jurisdictions today, there are rules permitting partial new trials. The problems that arise in determining whether a new trial should be granted, and, if so, whether it should be partial or complete, involve questions more persistent and significant than appear on the surface. Under what circumstances is a trial court justified in upsetting a jury verdict on the issue of damages when they are of a type not susceptible of mathematical computation? Under what circumstances is it justified in upsetting a jury verdict on liability when there is conflicting evidence on that issue? Under what circumstances is it justified in upsetting a jury determination on one issue and letting its determination on the other stand? And, after the trial judge has made his decision, to what extent is an appellate court justified in overruling him?

These questions were recently answered implicitly, at least, by the California Supreme Court in favor of appellate courts as against trial judges and in favor of trial judges as against juries.

In *Hamasaki v. Flotho*⁸¹ plaintiff, a five-year-old boy, was struck by an automobile driven by defendant. Injuries consisting of a brain concussion, several fractures of the skull, fracture of the collarbone, puncture wounds in the forehead and injuries to the eyes were not seriously contested. The evidence on the liability issue was close and conflicting. The jury, after thirteen hours of deliberation, during which it returned once to have material evidence on the issue of liability reread, finally awarded the plaintiff \$1,000. Plaintiff's special damages were in excess of \$800, making his general damages less than \$200. The plaintiff moved for a new trial on the issue of damages only, and the defendant moved for a new trial on the issue of liability. Plaintiff's motion was granted and defendant's denied. Defendant appealed from the granting of plaintiff's motion, and the Supreme Court of California, one justice dissenting, reversed and ordered a new trial on all the issues, on the ground that a compromise verdict had been returned by the jury. The damages were considered grossly inadequate and a reflection of uncertainty as to defendant's liability. In so deciding, *Quevado v. Superior Court*,⁸² which held that the power of an appellate court was restricted within the limits of the motion as made, was expressly overruled.

Problems such as are involved in the instant case and outlined at the beginning of this section are rarely the subject of general legislative rules. They concern the nature of the judicial function—how

⁸¹ 39 Cal.2d 602, 248 P.2d 910 (1952), 28 N.Y.U.L. Rev. 905 (1953).

⁸² 131 Cal. App. 698, 21 P.2d 998 (1933).

judges decide cases, and what their relationships are to juries and to other judges. There are plenty of statutory regulations as to such matters as to whether partial new trials can be granted, as to the time for making motions for new trials, and as to the form which such motions should take. These, however, are matters of relative unimportance. There is precious little in the way of legislative guidance for judicial discretion when proper and timely motions are made. Perhaps the absence of legislative rules explains the confusion and uncertainty which here prevails.⁵³

VIII

APPEALS

The proper function of appellate courts is defined by those courts themselves, case by case. One type of controversy which they refuse to decide is the "moot" case. But to this refusal, there is an exception recognized by some courts: they will decide such a case if it involves a question of unusual "public interest."⁵⁴ The exception is hazily defined, but has normally been confined to cases involving elections, taxes and public utility notes.⁵⁵

A widening of the exception took place in *People ex rel. Wallace v. Labrenz*⁵⁶—a decision which almost saved a child's life. The circumstances were these: An eight-day-old infant was suffering from a blood condition which urgently required a blood transfusion if death or permanent mental disability was to be avoided. Though so advised by doctors, the parents of the infant refused to allow a transfusion on the grounds of religious belief. A petition was filed in an appropriate Chicago court to treat the infant as neglected and dependent within the meaning of the Illinois Juvenile Court Act, and to appoint a guardian for the purpose of consenting to a transfusion. This was done, and the transfusion administered. Nevertheless, the parents of the child appealed, claiming that the Juvenile Court Act was misconstrued, and furthermore that as construed and applied in this case, it violated their freedom of religion guaranteed by the State and Federal Constitutions. The Supreme Court of Illinois did not dismiss the appeal as moot, but instead confirmed the lower court decision, rejecting the arguments put forth by the parents of the child. The case is all the more remarkable because of the fact that serious constitutional questions were involved. Traditionally courts have

⁵³ See 40 Calif. L. Rev. 615 (1952), 14 U. of Pitt. L. Rev. 281 (1953); *Leipert v. Honold*, 39 Cal.2d 462, 247 P.2d 324 (1952); *Hamasaki v. Flotho*, 39 Cal.2d 602, 613, 248 P.2d 910, 916 (1952) (dissenting opinion).

⁵⁴ See cases collected in Note, 132 A.L.R. 1185 (1941).

⁵⁵ *Ibid.* See also *Willis v. Buchman*, 240 Ala. 386, 199 So. 892 (1940).

⁵⁶ 411 Ill. 618, 104 N.E.2d 769 (1952).

bent over backwards to avoid the determination of such questions unless absolutely necessary.⁵⁷

A few months later, an almost identical fact situation developed. Again an infant urgently needed a blood transfusion and again the parents refused to consent because of their religious beliefs. This time, the authorities, their path made clear by the *Labrenz* decision, were able to act quickly and confidently. Tragically, however, the infant died before the transfusion could be administered.⁵⁸

It is probable that still other similar fact situations will arise in the future. If so, the *Labrenz* decision may well be instrumental in actually saving lives.

IX

CONCLUSION

The 1953 output of state civil procedure materials seems to indicate what may have been the case ever since the Field Code of 1848: that the vital, dynamic force in this area is legislative activity. Where the courts are left alone to develop an area of procedural law by the case method—as in the field of evidence—they tend to make a mess of it. They do far better when acting in a legislative capacity in the exercise of a general rule-making authority. Whether they do enough better to justify the current enthusiasm for judicial rule-making remains to be seen. What does seem clear, however, is that the legislative process is better adapted than the judicial process for the formulation and improvement of general rules of procedure. The same men dealing with the same subject matter produce different results depending upon whether they are acting in a judicial or a legislative capacity.

⁵⁷ See cases collected in Comment, 27 N.C.L. Rev. 221 (1949); *Ashwander v. TVA*, 297 U.S. 288 (1936).

⁵⁸ N.Y. World Telegram & Sun, Jan. 14, 1954, p. 4.

CRIMINAL PROCEDURE

KENNETH KAPLAN

CONFORMANCE with established criminal law procedural rules, with few significant developments, marked an active if not definitive year. For all the myriad cases presenting questions of procedural matters that appeared on the judicial horizon, well-defined rules of procedure remained subject to scant variance, for in the main, current decisions merely repeated their application to various fact patterns.

Although cases involving the so-called "extraordinary" and "summary" remedies proved the most prolific, even this field failed to present novel or unique situations.

I

ARREST

Constitutional questions concerning search and seizure arose not infrequently where a challenge was addressed to the legal propriety of an arrest. *Branning v. State*¹ displays the right, under the Mississippi Code, of an officer to arrest without a warrant when a felony has been committed, where the arresting officer has reasonable grounds to believe that the person arrested has committed the felony. In this case a drugstore had been burglarized. The basis of the police officer's "reasonable grounds" for believing the defendant guilty of the burglary and thus for arresting him without a warrant, was lodged in the fact that the defendant had been seen in the drugstore prior to the burglary. After arresting the defendant, the officers found a small box containing narcotics in a receptacle in defendant's automobile. Although he was actually convicted for possessing these narcotics, the appellate court reversed the judgment of conviction, holding that the mere fact of defendant's presence in the drugstore before its being burglarized did not furnish "reasonable grounds" for believing him guilty of the burglary. Ergo, they held that the arrest being illegal, the prosecution for possessing narcotics must fall since evidence thereon had been obtained as the result of an illegal arrest.

Other decisions highlighting the problems surrounding arrest were *Mathis v. State*² and *Palmer v. Commonwealth*.³ In the former case the facts related to the search of premises pursuant to a warrant which named a person other than the defendant. The search revealed

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¹ 215 Miss. 223, 60 So.2d 633 (1952).

² 256 P.2d 465 (Okla. Crim. App. 1953).

³ 252 S.W.2d 677 (Ky. App. 1952).

an illegal supply of intoxicating liquor. The searching officers ascertained that the premises were rented to the defendant, who was later encountered approaching the premises with a supply of illegal liquor in his car. Submitted to the court was the question concerning the validity of the defendant's arrest. The court maintained that the officers, by noticing illegal liquor in the defendant's car at the time of their meeting, in effect witnessed the commission of a misdemeanor in their presence, thus validating an arrest without a warrant. It should be noted that in the *Branning* case the evidence of illegal possession of narcotics was discovered as an incident to the illegal arrest on the burglary charge, whereas in the *Mathis* case the arresting officers were not seeking to arrest the defendant when they saw liquor openly visible in the defendant's car; thus the misdemeanor was committed in the officers' presence.

In the *Palmer* case, a Kentucky statute provided that an arrest may be made by a peace officer without a warrant when a misdemeanor is committed in his presence or where he has reasonable grounds to believe that the person arrested has committed a felony. Here the legality of an arrest without a warrant of one committing a public offense in the presence of an officer was the primary issue. The court gave impetus to the principle that a valid arrest was effected if there were reasonable grounds for the belief that the person arrested was drunk, thus committing a misdemeanor in the presence of the officer.

In upholding the sufficiency of a police officer's affidavit on which a search warrant was based, the court, in *Washington v. United States*,⁴ held adequate affiant's allegation that he had received information "from a source which in the past had proved reliable," that a numbers business was being conducted over a certain telephone; that investigation revealed the telephone to be listed for the premises named in the warrant and that the premises were the headquarters of known numbers operators. Stressing the rule that the probable cause need not be of such a nature that the deponent possess legal evidence sufficient to convict, the court declared:

Probable cause exists where "the facts and circumstances within [the officers'] knowledge and of which they had reasonable trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed.⁵

Sufficiency of probable cause for the issuance of a search warrant was also reviewed in *United States v. Johnson*⁶ where the court granted

⁴ 202 F.2d 214 (D.C. Cir. 1953).

⁵ Id. at 215, quoting from *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949).

⁶ 113 F. Supp. 359 (D.D.C. 1953).

a defense motion to suppress evidence and for the return of seized property. The search warrant was based upon the affidavits of two police officers to the effect that on seven occasions the defendant had been seen leaving apartment A "with a noticeable bulge in his overcoat pocket," and driving to apartment B, the subject of the search warrant. Testimony was elicited that on one of these occasions the defendant had made number plays at the first apartment. The court, in granting the defendant's motion, observed that the search of apartment B was conducted with a warrant based upon insufficient probable cause, stressing the fact that probable cause means more than mere suspicion; there must be knowledge and information sufficient in themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed. The facts as outlined failed to raise any inference of illegal activity at apartment B above mere conjecture and did not warrant the invasion of a private dwelling.

In conjunction with this problem, in an Oklahoma case,⁷ the court held sufficient an affidavit justifying the issuance of a search warrant where the affiant alleged that intoxicating liquors were stored on premises, the subject of the search warrant, and the premises were used as a place for obtaining and drinking intoxicating liquors.

II

BAIL

The setting of bail pending judicial processes and bond forfeiture proceedings are the two principal categories raising problems concerning bail. Although no case raising these questions reached the United States Supreme Court for final adjudication, one question of particular interest was involved in *United States v. Schneiderman*.⁸ Fourteen defendants stood convicted of conspiring to commit offenses against the United States under the Smith Act,⁹ in that they wilfully advocated, taught, and helped organize, as the Communist party of the United States, persons teaching and advocating overthrow of the Government by force. Failing to find in the case any substantial question which should be determined by the appellate court, the trial court refused bail pending the appeal, enunciating the fundamental rule that the absolute right of one convicted pertained only to the application for bail. The attention of the court was also directed to outside factors which would negate the effect of the bond as a deterrent to defendants' flight from the court's jurisdiction.

⁷ *Staley v. State*, 256 P.2d 822 (Okla. Crim. App. 1953).

⁸ 106 F. Supp. 941 (S.D. Cal. 1952).

⁹ 18 U.S.C. § 371 (Supp. 1952).

Great notoriety surrounded the case of *United States v. Kremen*.¹⁰ Thompson and Steinberg were convicted in the widely publicized case of *United States v. Dennis*¹¹ wherein eleven persons were charged, tried and convicted of conspiracy in violation of the Smith Act. After sentencing, pending appeal, and while on bail, Thompson and Steinberg fled and were subsequently apprehended by agents of the Federal Bureau of Investigation. The defendants were charged with comforting and assisting the convicted violators. Involved here were the questions whether the offenses charged in this case were to be classified with the Smith Act cases for the purpose of determining the norm in the setting of bail and whether or not any special circumstances requiring the setting of a higher bail than the Smith Act norm would apply to the defendant assistors. The United States Commissioner fixed bail for all defendants at \$35,000, an amount in excess of the norm. The district court substantially reduced the bail of all defendants charged with being assistors, saying no special circumstances were present so as to set bail above the norm. However, the special circumstances necessary for excess bail existed in the case of Steinberg, an actual violator, who, on prior occasions, had shown no respect for court orders.

A motion for application for bail pending appeal from an income tax evasion conviction was denied by a federal district court in *United States v. Glazer*.¹² The court rendered an opinion in conformity with established rules concerning bail: when the evidence against the movant is sufficient to warrant a conviction and no novel question of law is presented, bail, pending appeal, will be denied on the ground that no substantial question is presented for determination by the appellate court. Relative to the defendant's right to bail pending an appeal from a conviction, the court, citing *D'Aquino v. United States*,¹³ declared:

Are new or novel points raised in the motion for new trial? Are unique facts presented not covered by the controlling opinions? Are important questions concerning the scope and meaning of decisions of the Supreme Court presented? Is there a showing of denial of a fair trial? Such are matters to be considered with the burden on defendant.¹⁴

The right to postconviction bail pending appeal obviously rests upon the proof of an affirmative answer to one of the above questions.

The substantial-question theory was further commented upon in

¹⁰ 114 F. Supp. 899 (N.D. Cal. 1953).

¹¹ 341 U.S. 494 (1951).

¹² 14 F.R.D. 86 (E.D. Mo. 1952).

¹³ 180 F.2d 271 (9th Cir. 1950).

¹⁴ *United States v. Glazer*, 14 F.R.D. 86, 88 (E.D. Mo. 1952).

*United States v. Stephenson*¹⁵ where the court stated that a "substantial question" within the statute providing for bail is any question that is fairly debatable.

Forfeiture of the entire bond following defendant's failure to appear at trial was upheld as not an abuse of discretion in *United States v. Davis*.¹⁶

III

GRAND JURY

In a number of cases motions to expunge from the records of the court portions of a grand jury report which contained findings for which the grand jury returned no indictment were successfully upheld. Although it is clear that grand juries have broad inquisitorial powers, the courts have shown themselves prone to expunge those portions which contain imputation of misconduct or wrongdoing unless an indictment follows.¹⁷

In discussing the scope of a grand jury's powers in *Application of Radio Corp. of America*,¹⁸ Judge Weinfeld said:

The grand jury is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime.¹⁹

The broad inquisitorial powers naturally include the right and duty to report by way of a presentment the results of such an investigation; but where such a report contains findings which would have warranted an indictment and one was not forthcoming, the parties offended are entitled to have that portion of the report expunged.²⁰ A motion to expunge from the record a presentment handed up by a grand jury and received by another judge would, however, be denied since to expunge the presentment would be tantamount to an appellate court action by one judge over his colleague.²¹

Motions directed to the quashing of an indictment for the improper composition of the grand jury were less successful. In one case²² a grand jury was held to be legally constituted where its composition consisted of twenty-two members, properly selected, and an

¹⁵ 110 F. Supp. 623 (D. Alaska 1953).

¹⁶ 202 F.2d 621 (7th Cir. 1953).

¹⁷ *Shoemaker v. State*, 260 P.2d 521 (Utah 1953).

¹⁸ 13 F.R.D. 167 (S.D.N.Y. 1952).

¹⁹ *Id.* at 170, quoting from *Blair v. United States*, 250 U.S. 273, 282 (1919).

²⁰ *Ex parte Faulkner*, 251 S.W.2d 822 (Ark. 1952).

²¹ *Application of United Electrical, Radio & Machine Workers of America*, 109 F Supp. 92 (S.D.N.Y. 1952).

²² *People v. Shipman*, 414 Ill. 393, 111 N.E.2d 545 (1953).

additional juror called by the sheriff. Sixteen members were sufficient to constitute a grand jury and a valid presentment could be returned by any twelve. However, a West Virginia case held a grand jury to be unlawfully constituted and the indictment void where one of the jury commissioners was illegally chosen by a court clerk to fill a vacancy; the mandatory statute requires selection by the court.²³

Relative to this problem is the court's holding in *People v. Hopkins*²⁴ that the selection of one grand juror from each of sixteen sparsely populated townships, the remaining seven jurors being drawn from one heavily populated township, constituted substantial compliance with a statute requiring selection of "as near as may be a proportionate number from each town or precinct."

IV

INDICTMENT AND INFORMATION

Errors resulting from improper drafting of indictments and informations were the chief sources of attack when these pleadings were the subject of motions to quash. For the most part these attacks met with little success. The courts' refusal to upset ultimate judgments of conviction stemmed from the fact that the primary purpose of an indictment is to inform the defendant of the nature of the offense charged against him so that he may adequately prepare his defense, while the second function of an indictment is to serve as a shield from another indictment for the same offense.²⁵ Thus where certain counts of an indictment charged conspiracy to "embezzle, abstract, purloin, and willfully misapply moneys, funds and credits" and making false entries in books and statements of a bank, the court held that the conspiracy count set forth the object of the alleged conspiracy "with certainty to a common intent" and was not fatally defective in failing to differentiate between the "moneys," "funds" and "credits" of the bank. The court pointed out that the gist of the crime of conspiracy is the unlawful agreement, and it is not necessary when alleging conspiracy to set forth the criminal object of the conspiracy with as great certainty as would be required in cases where such object is charged as a substantive offense.²⁶ The validity of a perjury indictment was likewise upheld which charged the defendant with knowingly and untruthfully denying under oath statements made at a meeting, notwithstanding the fact that the indictment failed to name the person to whom the alleged statements were made.²⁷ The

²³ *State v. Howard*, 73 S.E.2d 18 (W. Va. 1952).

²⁴ 415 Ill. 11, 111 N.E.2d 587 (1953).

²⁵ See *State v. LeFante*, 12 N.J. 505, 97 A.2d 472 (1953).

²⁶ *United States v. Westbrook*, 114 F. Supp. 192 (W.D. Ark. 1953).

²⁷ *State v. Borelli*, 27 N.J. Super. 223, 98 A.2d 713 (County Ct. 1953).

court expressed the view that the person's name was not an element of proof of the crime of perjury and therefore not necessary, and that the indictment contained all the essentials required to apprise the defendant of the charges against him.

Many current decisions were found consistent with the view that the sufficiency of an indictment would not be disturbed for want of averment of matter not necessary to be proved, thus embracing the trend away from stressing old common-law technical necessities. The following illustrate the premise: Reference to an occupant of burglarized premises as a "company" rather than a "corporation" was merely an amendment of form and withdrawal of the affidavit for purpose of refileing an amendment was not necessary;²⁸ recitation of the long-settled practice in New York State that it is not reversible error to include in an indictment allegations charging defendant as a prior offender and the receipt of proof thereof at the subsequent trial;²⁹ denial of a motion for a new trial on the grounds that failure to set forth the person before whom an oath was taken together with the latter's authority to administer same is not fatal to an indictment for perjury;³⁰ the allegation that defendant was a prisoner at a state farm and that he escaped therefrom, substantially complying with the language of a statute defining the crime of escape, is sufficient to notify the defendant of the nature of the offense with which he was charged;³¹ affidavit held not objectionable because the jurat thereto had been signed in the name of the clerk by the deputy clerk as a deputy rather than in the name of the deputy clerk herself.³²

It must, however, be borne in mind that while the courts have, in a large degree, dispensed with the necessity for common-law technical phraseology in indictments and informations, the necessity of setting forth with reasonable certainty the essential elements of the offense charged remains subject to little judicial variance. In a North Carolina case³³ concerning offenses under lottery statutes, the exact accusation against the defendant was cloaked in uncertainty. The formal accusation alleged a crime in the alternative or disjunctive in such manner as to leave uncertain the basic accusation. A bill of particulars having as its purpose the informing of defendants of facts collateral to an indictment could not cure a defective indictment which used the word "wrongful" without alleging any specific conduct by defendants.³⁴ And an Ohio court dismissed a complaint which alleged

²⁸ *Jeffers v. State*, 114 N.E.2d 880 (Ind. 1953).

²⁹ *People v. DeSantis*, 305 N.Y. 44, 110 N.E.2d 549 (1953).

³⁰ *United States v. Young*, 113 F. Supp. 20 (D.D.C. 1953).

³¹ *People v. Hamm*, 415 Ill. 224, 112 N.E.2d 485 (1953).

³² *Craig v. State*, 112 N.E.2d 296 (Ind. 1953).

³³ *State v. Albarty*, 238 N.C. 130, 76 S.E.2d 381 (1953).

³⁴ *United States v. Callanan*, 113 F. Supp. 766 (E.D. Miss. 1953).

that the defendant had contributed to the delinquency of a minor because the complaint failed to charge facts constituting an offense. It did not charge that the child involved was a delinquent, nor did it set forth facts showing the child to be delinquent, nor that the accused had in any way contributed to the delinquency of the child.³⁵

V

TRIAL JURY

The effect of intense and prejudicial pre-trial publicity upon the selection of a trial jury was presented as a basis of the defendant's motion for a change of venue in *United States v. Florio*.³⁶ References to the defendant as a "mobster" and leader of an organization known as the "Ed Florio Gang" appeared in many metropolitan newspapers on the morning that the case was to proceed to trial and talesmen chosen for a voir dire. The court granted the motion, observing that the publicity went far beyond the sort that usually accompanies an important trial of public interest. The court drew a parallel between this case and the case of *Delaney v. United States*,³⁷ in which the second circuit held reversible error the denial of a motion for a continuance because of prejudicial pre-trial publicity. Said the court in the *Delaney* case (which in effect summed up Judge Kaufman's sentiments in the instant case):

One cannot assume that the average juror is so endowed with a sense of detachment, so clear in his introspective perception of his own mental processes, that he may confidently exclude even the unconscious influence of his preconceptions as to probable guilt, engendered by a pervasive pre-trial publicity.³⁸

An opposite view regarding pre-trial publicity was embraced in the *Carper* case³⁹ where the court held the pre-trial publicity was insufficient to show that prejudice against the defendants necessitated a change of venue.

A variety of other problems, none of them particularly unique in nature, concerning the selection of a trial jury was found in other current decisions. Reversing a judgment of conviction in the *O'Keefe* case⁴⁰ the majority of the court held that in a prosecution for conspiracy and bribery relating to alleged gambling activities, the trial judge's inquiry into the qualifications of one of the jurors, occurring in the absence of the defendants and their counsel, was improper.

³⁵ *State v. Kiessling*, 93 Ohio App. 524, 114 N.E.2d 154 (1952).

³⁶ 13 F.R.D. 296 (S.D.N.Y. 1952).

³⁷ 199 F.2d 107 (1st Cir. 1952).

³⁸ *Id.* at 112-13.

³⁹ *United States v. Carper*, 13 F.R.D. 483 (D.D.C. 1953).

⁴⁰ *People v. O'Keefe*, 280 App. Div. 546, 115 N.Y.S.2d 740 (3d Dep't 1952).

The appellate court noted that the impaneling of a jury was part of the trial and the presence of the defendants was necessary at all "parts of the trial." Since a juror's qualification to serve rests within the trial court's discretion, a South Carolina case held the trial judge did not err in refusing to dismiss certain jurors for cause, irrespective of the fact that they uttered a preconceived opinion as to the innocence of the defendants.⁴¹ However, for an alternate juror to state to a regular juror, even though the latter expressed her disbelief of the statement, that he had heard the defendant ran a house of assignation was reversible error.⁴²

The propriety of persons previously convicted of a felony to serve as trial jurors was the subject of discussion in two cases. A Texas decision⁴³ held that a judgment entered upon a verdict of a jury was neither void nor subject to collateral attack in habeas corpus proceedings notwithstanding the fact that one of the members of the jury was an unpardoned convict and pursuant to statute could have been challenged for cause. The appellate court stated that had the legal infirmity been known to the trial court prior to the return of the verdict, the juror should have been dismissed from service, or in the case of conviction, a new trial granted without any regard to a showing of injury or even a consent or waiver of the status. In the *Ford* case⁴⁴ the court of appeals held that in the absence of showing of bias or prejudice, the objection to a juror predicated upon his previous felony conviction is too late when made after a verdict had been rendered in a perjury action.

VI

PROBLEMS AT TRIAL

Interjection of remarks during the course of a trial by the judge and insertion of the force of his character so as to render his conduct improper and prejudicial was the basis of reversible error in a number of decisions. In the main, most of the remarks were uttered through inadvertance, although some cases evidenced a judicial demeanor which could not be characterized so charitably.

Indiscretions by the trial judge amounting to a marked display of partiality and hostile conduct toward the defense counsel and witness to such an extent as to make it obvious to the trial jury that he considered the defendant guilty of murder served as a basis for reversal of a conviction in the *Marino* case.⁴⁵ Replete with sarcasm

⁴¹ *State v. Gantt*, 76 S.E.2d 674 (S.C. 1953).

⁴² *People v. Cocco*, 305 N.Y. 282, 113 N.E.2d 422 (1953).

⁴³ *Ex parte Bronson*, 254 S.W.2d 117 (Tex. Crim. App. 1952).

⁴⁴ *Ford v. United States*, 201 F.2d 300 (5th Cir. 1953).

⁴⁵ *People v. Marino*, 414 Ill. 445, 111 N.E.2d 534 (1953).

and voiced incredulities on the part of the court, the examination of a defense witness was culminated with the statement: "This is the most fantastic thing I ever listened to in all my life."

Similarly, a California court's exoneration of a state's witness from complicity in a crime was in effect a comment directed toward the witness' credibility, an inroad upon the rights of the jury, and prejudicial to the defendant.⁴⁶ In reversing a judgment of conviction for violation of the narcotics law, the court in the above decision stated the basic, indeed elementary, demeanor of a trial judge:

it is of the highest importance in the administration of justice that the court should never invade the province of the jury, should give them no intimation as to his opinion upon the facts but should leave them wholly unbiased by any such intimation to ascertain the facts for themselves.⁴⁷

In a North Carolina case, prejudicial error resulted when the over-all tenor of the manner in which the presiding judge interrogated a defense witness went beyond the bounds of mere impartial elicitation of testimony, falling within the purview of impeachment of the witness' testimony.⁴⁸

Several cases required reversal because of improper remarks made by prosecuting attorneys during the course of the trial. The prosecuting attorney's allusions to other crimes, calculated to inflame the minds of the jurors, and his statements that if the jury acquitted the defendant of murder they would have to "run the gauntlet of [their] friends when [the jurymen] get to the street" and would be "afraid to listen to the radio and read [their] newspapers" were statements improperly impressing the jury to reach a verdict on factors outside of the evidence adduced at the trial. These statements went far beyond the latitude given to arguments to jury.⁴⁹ In a Texas case,⁵⁰ a district attorney made the following statement in his closing argument to the jury:

I and the other officers decided that he was guilty and had shot her down like a dog. The grand jury thought he was guilty.

This was obviously improper argument and highly prejudicial, warranting reversal of a conviction of murder.

The *Gluck* case,⁵¹ in which a conviction for rape was reversed, presents a more striking and vivid example of the prosecuting attor-

⁴⁶ *People v. Ramirez*, 113 Cal. App.2d 842, 249 P.2d 307 (1952).

⁴⁷ *Id.* at 854, 249 P.2d at 315, quoting from *People v. Conboy*, 15 Cal. App. 97, 100, 113 Pac. 703, 704 (1911).

⁴⁸ *State v. Kimrey*, 236 N.C. 313, 72 S.E.2d 677 (1952).

⁴⁹ *State v. Spencer*, 258 P.2d 1147 (Idaho 1953).

⁵⁰ *Alford v. State*, 258 S.W.2d 817 (Tex. Crim. App. 1953).

⁵¹ *Gluck v. State*, 62 So.2d 71 (Fla. 1952).

ney's interjection of highly prejudicial remarks, calculated to remain imbedded in the memory of the jury with the seemingly tacit approval of the court. In addition to an epithet-laden address to the jury in language so vile, obscene, and abusive as to be unquotable in the appellate court's opinion, the prosecution, in reference to the fact that the appellant's family was "sticking to him" stated:

I would not doubt that they would stick by as long as they are able. This is one admirable trait of the people of this religion. No matter what the husband does, he can do anything without any complaint by the wife. . . .⁵²

A reversal of a murder conviction in the *Manning* case⁵³ resulted from objectionable statements injecting racial issues into argument. An example of the intemperate language employed by the prosecuting attorney can be displayed by the following quotation from the record on appeal:

I want to tell you something else. I don't care who hears it. I wish Judge Fort were here sitting in this courtroom. I remember a scolding he gave some people who had come into this court who knew absolutely nothing about the colored folks. I would rather lose my right arm than to go on a colored man's good character. . . . Let me tell you this, how can any white man come in here and tell you he knows the reputation of a colored man in this Community—it was a disgrace for an officer of the town of Dickson to come in here and say that man had a good character. I think that's a disgrace to any County.⁵⁴

*Evans v. State*⁵⁵ and *Washington v. State*⁵⁶ concern references by the prosecution to the defendant's failure to testify. The former resulted in a reversal while in the latter the court indicated that the improper remark which was the subject of appeal, when considered in connection with the remainder of the argument, was not an allusion to the defendant's failure to testify, but rather a retort by the prosecutor to the defense counsel's belittling of the state's witnesses.

VII

EXTRAORDINARY REMEDIES

In conjunction with the fundamental theorem that persons in penal restraint who assert a meritorious reason showing their confinement to be a result of deprivation of due process shall be heard, a multitude of motions and applications involving the so-called extra-

⁵² Id. at 72.

⁵³ *Manning v. State*, 257 S.W.2d 6 (Tenn. 1953).

⁵⁴ Id. at 8.

⁵⁵ 255 S.W.2d 967 (Ark. 1953).

⁵⁶ 65 So.2d 704 (Ala. 1953).

ordinary remedies were presented for judicial consideration. Included within this phase of criminal procedure are many current decisions concerning application for the common-law writ of error coram nobis. The appellate courts held unalterable the established rule that the purpose of the writ is to correct a judgment on the ground of error of fact not appearing on the face of the record or unknown to the court when judgment was pronounced. Further, the courts reiterated the fact that the writ cannot be employed as a substitute for ordinary appeal procedures,⁵⁷ nor will the court, on a hearing for such application or petition, weigh conflicting evidence or determine credibility of witnesses.⁵⁸

The defendant's right to be represented by counsel and to be so advised by the court were the bases of petitions in numerous cases.⁵⁹ The timeliness of filing the petition provided the subject matter of a Florida decision⁶⁰ where the fact picture involved the filing for a writ of error coram nobis twenty-two months after entry of the judgment and eleven months after petitioner gained knowledge of the facts. The court, in refusing to consider the merits of the petition, said good cause was not shown for the delay in filing.

⁵⁷ *People v. Allen*, 259 P.2d 474 (Cal. App. 1953).

⁵⁸ See *Lykins v. State*, 108 N.E.2d 270 (Ind. 1952); *Burns v. State*, 231 Ind. 563, 108 N.E.2d 626 (1952), cert. denied, 345 U.S. 958 (1953).

⁵⁹ Application was denied in the following cases: *People v. McGulness*, 121 N.Y.S.2d 316 (County Ct. 1953) (official court records, judge's affidavit, photostatic copies of minutes of petitioner's arraignment, and sworn statements of probation officer conclusively refuted petitioner's contention that at no time was he advised by the court as to right of counsel); *State v. Pyle*, 173 Kan. 425, 248 P.2d 1086 (1952), cert. denied, 344 U.S. 915 (1953); *Lance v. People*, 204 Misc. 105, 119 N.Y.S.2d 862 (County Ct. 1953) (evidence presented by petitioner was insufficient to establish the fact he was not advised of right to counsel); *People v. Yancovich*, 122 N.Y.S.2d 205 (County Ct. 1953) (testimony of codefendant rendered petitioner's testimony insufficient to overcome presumption of regularity of proceedings).

Application was granted in the following cases: *People v. Alessi*, 280 App. Div. 961, 117 N.Y.S.2d 364 (4th Dep't 1952) (petitioner's positive allegation that he was not advised of his right to counsel on his arraignment, plea or sentence was conclusively refuted by unquestionable documentary proof); *People v. Dalton*, 203 Misc. 268, 118 N.Y.S.2d 263 (County Ct. 1953) (falsity of petitioner's allegation as to lack of counsel was not conclusively demonstrated by records); *People v. St. John*, 281 App. Div. 1061, 121 N.Y.S.2d 441 (3d Dep't 1953) (a triable issue of fact was presented on the question of whether the petitioner had been advised by the court of his right to counsel); *Flynn v. People*, 117 N.Y.S.2d 545 (County Ct. 1952) (presumption of regularity in the proceedings that resulted in petitioner's conviction was overcome where uncontroverted proof by petitioner showed he never was represented by counsel or interviewed by counsel assigned by the court); *Juliane v. Chemung County Court*, 282 App. Div. 822, 123 N.Y.S.2d 610 (3d Dep't 1953) (a seventeen-year-old defendant, without aid of counsel, pleaded guilty to second-degree assault, was given a suspended sentence, immediately arrested without a warrant as a parole violator, arraigned on that charge without aid of counsel and sentenced); *Winn v. State*, 111 N.E.2d 653 (Ind. 1953) (petitioner was not, at time of arraignment, advised by the court of his right to counsel).

Two New York decisions⁶¹ dealt with the denial of the writ where errors of law appeared upon the face of the record. Except for the Supreme Court decision in *Brown v. Allen*,⁶² cases involving collateral attack by way of an application for the writ of habeas corpus merely re-emphasized established precedent. Judicial exploration of novel or unique phases of this remedy was hardly evidenced notwithstanding the great number of cases that were presented. Questions concerning bail,⁶³ counsel,⁶⁴ extradition proceedings,⁶⁵ and the necessity for exhaustion of state remedies prior to a federal district court's assuming jurisdiction⁶⁶ proved to be the most fertile sources employed as the bases for an application for the writ.

The employment of a collateral attack in the form of a writ of habeas corpus cannot serve as a substitute for a motion to quash an information or indictment or an appeal.⁶⁷ The court quoted the succinct definition of the office of the writ as set forth by Doyle, J., in *Ex parte Wood*:⁶⁸

The office of the writ of habeas corpus is not to determine the guilt or innocence of the prisoner, and the only issue which it presents is whether or not the prisoner is restrained of his liberty by due process of law, and a defendant held by virtue of an information preferred by a proper prosecuting officer in a court of competent jurisdiction cannot be discharged on habeas corpus for insufficiency of the evidence on his preliminary examination to show commission of a felony or probable cause to believe him guilty thereof. A defendant has the right to raise this question in a court where the information is pend-

⁶⁰ *Pynes v. State*, 66 So.2d 277 (Fla. 1953). See also *People v. Wurzler*, 280 App. Div. 1020, 116 N.Y.S.2d 756 (3d Dep't 1953).

⁶¹ *People v. Blair*, 203 Misc. 553, 118 N.Y.S.2d 405 (County Ct. 1953); *People v. Kahn*, 281 App. Div. 982, 120 N.Y.S.2d 611 (2d Dep't 1953).

⁶² 344 U.S. 443 (1953), discussed in *Federal Jurisdiction and Practice*, pp. 723-24 supra.

⁶³ *Sykes v. Warden*, 93 A.2d 549 (Md.), cert. denied, 345 U.S. 937 (1953); *Quillen v. Betts*, 98 A.2d 770 (Del. 1953); *Duke v. Smith*, 253 S.W.2d 242 (Ky. 1952); *Ex parte Martinez*, 251 S.W.2d 730 (Tex. 1952); *Taylor v. Warden*, 92 A.2d 757 (Md. 1952).

⁶⁴ *Commonwealth ex rel. Cameron v. Burke*, 172 Pa. Super. 26, 92 A.2d 255 (1952); *Baker v. Ellis*, 204 F.2d 353 (5th Cir. 1953); *DeWolf v. Waters*, 205 F.2d 234 (10th Cir. 1953); *Presley v. Warden*, 92 A.2d 754 (Md. 1952); *Ex parte Roberts*, 40 Cal.2d 745, 255 P.2d 782 (1953).

⁶⁵ *State ex rel. Kojis v. Barczak*, 264 Wis. 136, 58 N.W.2d 420 (1953); *Ex parte Dukes*, 26 N.J. Super. 173, 97 A.2d 507 (App. Div.), petition for habeas corpus denied, 13 N.J. 293, 99 A.2d 452 (1953); *Moulthrop v. Matus*, 139 Conn. 272, 93 A.2d 149 (1952), cert. denied, 345 U.S. 926 (1953); *Tyler v. Pierce*, 216 Miss. 498, 61 So.2d 309 (1952); *State ex rel. Kimbro v. Starr*, 65 So.2d 67 (Fla. 1953); *State ex rel. Bryant v. Fleming*, 260 S.W.2d 161 (Tenn. 1953).

⁶⁶ *Farley v. Skeen*, 107 F. Supp. 881 (N.D. W. Va. 1952); *United States ex rel. Carchietta v. Warden*, 112 F. Supp. 902 (E.D.N.Y. 1953); *Pebbley v. District Attorney*, 107 F. Supp. 838 (N.D. W. Va. 1952); *United States ex rel. Holly v. Keenan*, 107 F. Supp. 266 (W.D. Pa. 1952); *Galloway v. Dowd*, 204 F.2d 524 (7th Cir. 1953).

⁶⁷ *Ex parte Duncan*, 259 P.2d 538 (Okla. Crim. App. 1953).

⁶⁸ 110 P.2d 305, 308 (Okla. Crim. App. 1941) (concurring opinion).

ing, by motion to quash or set aside the information, upon adverse ruling by the court the remedy is by appeal from a judgment of conviction.⁶⁹

Likewise, *Commonwealth ex rel. Thomas v. Claudy*⁷⁰ held that matter assigned by the relator, that the indictment contained charges other than the robbery for which he was sentenced, was not reviewable on habeas corpus. Worthy of note in passing is the innovation in the office of the writ as set forth in the application by a federal prisoner seeking the writ for the purpose of reviewing disciplinary action taken on account of alleged breach of prison discipline. The court, taking a dim view of the use of the writ as a collateral attack on prison punishment, denied its application, saying that the courts have no power to supervise prison discipline which is entrusted to the Bureau of Prisons under the Attorney General.⁷¹

VIII

LITERATURE

As in the past years, adjective criminal law continues to receive an abundance of well-written and searching articles deserving of mention. Spotlighting police and racial tensions is a composite article entitled "Police and Law in a Democratic Society."⁷² Deep insight into the current social problem is reflected by John Edgar Hoover's "Juvenile Delinquency" appearing in the *Syracuse Law Review*.⁷³ Collateral remedies were the subjects of interesting and exhaustive articles entitled "Review of Criminal Cases in Maryland by Habeas Corpus and by Appeal"⁷⁴ and "Habeas Corpus, Civil Rights and the Federal System";⁷⁵ the *University of Pennsylvania Law Review* had an article entitled "Problems of Jury Discretion in Capital Cases"⁷⁶ which should prove of great interest to the profession. A note entitled "Judicial Discretion in Granting Bail"⁷⁷ discusses that problem fully.

⁶⁹ Ex parte Duncan, 259 P.2d 538, 540 (Okla. Crim. App. 1953).

⁷⁰ 173 Pa. Super. 238, 98 A.2d 260 (1953).

⁷¹ Henson v. Welch, 199 F.2d 367 (4th Cir. 1952). See 18 U.S.C. § 4042 (Supp. 1952).

⁷² Hall, 28 Ind. L.J. 133 (1953).

⁷³ 4 Syracuse L. Rev. 179 (1953).

⁷⁴ Markell, 101 U. of Pa. L. Rev. 1154 (1953).

⁷⁵ Rogge & Gordon, 20 U. of Chi. L. Rev. 509 (1953).

⁷⁶ Knowlton, 101 U. of Pa. L. Rev. 1099 (1953).

⁷⁷ 27 St. John's L. Rev. 56 (1953).

EVIDENCE

JUDSON F. FALKNOR

WITHOUT doubt, the most noteworthy development in this area in 1953 was the approval of the Uniform Rules of Evidence by the National Conference of Commissioners on Uniform State Laws at its August meeting in Boston. What are believed to be the most important of the changes proposed by these new rules are summarized in the final subdivision of the article. As for the judicial decisions, the primary emphasis, in this year's summary, has been placed on the cases interpreting and applying the self-crimination privilege, the *Rockin* doctrine and the hearsay rule.

I

SELF-CRIMINATION PRIVILEGE

May Accused Be Compelled to Furnish, Prior to Trial, Specimens of His Handwriting?—At a court-martial, where accused was charged with forgery and uttering forged writings, there were admitted in evidence against him two specimens of his handwriting which had been obtained from him (prior to trial) "unwillingly and through use of an order." He made and supplied the specimens "under express protest." His conviction, approved by the convening authority, was set aside by a board of review which held his privilege against self-crimination had been violated. This determination was, in effect, affirmed by the Court of Military Appeals.¹ The privilege, secured to an accused serviceman by the Uniform Code of Military Justice, is provided for in general terms,² although the *Manual for Courts-Martial*, interpreting the privilege, states explicitly that the privilege is limited to protection against testimonial compulsion, and thus, "does not forbid compelling [a person] to exhibit his body or other physical characteristics."³ Then, particularizing, it declares that it is not a violation of the prohibition to require a person (including an accused) "to try on clothing or shoes, to place his feet in tracks, to make a sample of his handwriting, to utter words for the purpose of voice

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¹ United States v. Eggers, 3 USCMA 191, 11 CMR 191 (1953).

² Article 31(a), 64 Stat. 118 (1950), 50 U.S.C. § 602(a) (Supp. 1952): "No person subject to this code shall compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him."

³ Manual for Courts-Martial § 150(b) (1951).

identification, or to submit to having fingerprints or a sample of his blood taken."⁴ The question, then, said the Court of Military Appeals, is whether the statement in the *Manual* is in conflict with the privilege secured to the accused by the Code. It held that it was. The court said that it was evidently the intention of Congress "to secure to persons subject to the Code the same rights secured to those of the civilian community under the Fifth Amendment to the Constitution of the United States—no more and no less."⁵ Thus, the court turned to the cases decided under the Fifth Amendment and similar state provisions. Laying aside cases where the accused had voluntarily submitted handwriting specimens and those requiring him to submit such on cross-examination, the court said that "this weeding-out process leaves relatively little case material directly in point," but one case, said the court, a decision of the Supreme Court of the Philippine Islands,⁶ where a writ of prohibition was granted forbidding the trial court from ordering "a prospective accused" in a forgery case "to write from dictation the contents of a questioned document."

The Court of Military Appeals took cognizance of what it termed "a number of settled exceptions to the privilege." One may be fingerprinted and photographed, may be compelled to don an item of clothing,⁷ to put his foot in a footprint, to stand for identification,

⁴ *Ibid.* The board of review appears to have held that this provision of the *Manual* applies "only to the trial proper," and then only on the cross-examination of the accused, "where, for example, he had denied on direct that a signature in question was his own." *United States v. Eggers*, 3 USCMA 191, 195, 11 CMR 191, 195 (1953). But the Court of Military Appeals rejected this strange interpretation. "As we see it, paragraph 150b *supra*, applies to a handwriting specimen secured at any time—whether before or during trial." *Id.* at 195, 11 CMR at 195.

⁵ *United States v. Eggers*, *supra* note 4.

⁶ *Beltran v. Samson and Jose*, 53 Phil. Is. 570 (1929). See also Comment, *May a Defendant be Compelled to Give a Specimen of His Handwriting?*, 21 Phil. L.J. 71 (1941). Not cited by the court, but supporting, in principle, the court's conclusion is *State v. Mayer*, 154 Wash. 667, 283 Pac. 195 (1929). In this case, the accused, charged with grand larceny, was not sworn and did not formally testify. But, to meet the state's contention that he had forged a telegram ostensibly sent by one Bassett, defendant, at the instance of his own counsel, at the trial and in the presence of the jury, made several specimens of his handwriting which were offered in evidence by defendant and admitted. Defendant requested an instruction that no inference of guilt could be drawn from his failure to testify, an instruction to which he was entitled under the local law, if he had not testified. The instruction was refused and his conviction was affirmed. By submitting the handwriting specimens, he had testified, said the court, and had thus waived his privilege. This seems to mean that the state could not have compelled him to do what he did voluntarily. For what appears to this writer to be an entirely sound criticism of the *Mayer* holding, see Hilling, *The Case of Decasto Earl Mayer and Mary Ellen Smith*, 22 Wash. L. Rev. 79, 105 (1947).

⁷ In *People v. Robarge*, 255 P.2d 877 (Cal. App.), *rev'd* on other grounds, 262 P.2d 14 (Cal. 1953), a robbery prosecution, the police, at the request of an identifying witness, required defendant to put on dark glasses. After conviction, defendant contended this compulsion "was violative of the due process clause of the Constitution,"

etc. On the other hand, said the court, is the rule of the *White* case⁸ protecting against the compulsory production of "personal documents and chattels." Is compelling one to furnish handwriting closer to requiring him to produce documents or is it more nearly comparable to a demand that he submit to fingerprinting, that he place his foot in a footprint, and the like? The sound answer, said the court, is to be found in the Philippine case.⁹ The court's conclusion:

in that he was "made to bear false [sic] witness against himself." The court held that defendant "was not denied any constitutional right," citing prior holdings from California and elsewhere to the effect that an accused, at his trial, could be required to stand for purposes of identification, to remove a visor, to "stand up and remove his glasses," or to "put his cap on."

⁸ *United States v. White*, 322 U.S. 694 (1944).

⁹ The court also cited and relied on Wigmore, Code of Evidence, Rule 208, art. 3(b) (3d ed. 1942), which reads as follows: "The person's *bodily condition* is within the privilege, (1) in so far as he is asked to disclose it by his own volition for the sole purpose of furnishing evidence. . . . Illustrations: (1) To require a person to use his voice for identification, or to write a sample of handwriting is within the privilege. . . ." The court said: "Dean Wigmore, in [the third edition of] his Treatise on Evidence recognizes the present problem, but—oddly enough—takes no positive position on the matter. . . ." *United States v. Eggers*, 3 USCMA 191, 197, 11 CMR 191, 197 (1953). This is indeed strange, particularly in view of the fact that Wigmore did take a very positive position in respect to both voice identification and handwriting in his *second* edition. "On the principal varieties of situation presented, the following reasonings may be offered: *Measuring or photographing* the party is not within the privilege. Nor is the *removal or replacement* of his garments or shoes. Nor is the requirement that the party move his body to enable the foregoing things to be done. Requiring him to make *specimens of handwriting* is no more than requiring him to move his body. Requiring him to *speak words* for identification of his voice is no more than requiring the revelation of a physical mark." 4 Wigmore, Evidence 878 (2d ed. 1923). In the corresponding section of the third edition, there has been substituted, for the above, this innocuous statement: "The following are the principal varieties of situations presented: *Measuring or photographing* the party; *Removal or replacement* of his garments or shoes, for identification, and requiring that the party *move his body* to enable the foregoing things to be done; Requiring him to make *specimens of handwriting*; Requiring him to *speak words* for identification of his voice. . . ."

⁸ Wigmore, Evidence 380-81 (3d ed. 1940). The third edition includes no explanation of this change. Not only is it not explained, it appears unexplainable; unexplainable and baffling in view of the vigor of his position in the second edition, a position which has obviously exerted a very potent influence on the development of the law in the last two or three decades. And the contradiction between the second edition of the Treatise and later editions of his Code is also puzzling, although there is a possible explanation as to this. In the first edition of the Treatise (§ 2265), while taking the position that compelled bodily exhibition, generally, is not within the privilege, Wigmore did say: "Of the cases which thus fall within the privilege, those of requiring an utterance of voice for identification, or an inscription of handwriting to be used . . . are perhaps safely within the line of protection." Apparently Wigmore's Code (the first edition of which was published in 1910) was formulated in accordance with the view he held at the time of the publication of the first edition of the Treatise in 1905 and it seems not unlikely that his failure to modify the second and third editions of the Code (published in 1935 and 1942) to conform with the view he so strongly expressed in the second edition of his Treatise (published in 1923) was due to inadvertence. But this of course does not explain why in the third edition of the Treatise he appears to have receded from the position which he took in the second edition of the Treatise.

Law enforcement authorities could *not* require a man to produce his diary—a pre-existing sample of handwriting. . . . Would it then make anything but nonsense to say that the same man *could* be compelled to seat himself in the presence of the same authorities and to execute several pages in longhand?¹⁰ Certainly not. Indeed, there is a distinct difference between the present handwriting problem, on the one hand, and the fingerprint and the foot-in-footprint situations, on the other. The latter require only *passive* cooperation, whereas the former requires *active* participation and *affirmative* conduct in the production of an incriminating document not theretofore in existence.¹¹

¹⁰ My own view is that such a position not only is not nonsense, but rather makes plenty of sense. Should an accused be required to produce a pre-existing diary, he would be required to "speak" to his own guilt—the compulsion would clearly be "testimonial"—because, in effect, by the act of production, he is forced to authenticate the writing as his diary, as his handwriting. In effect, he is compelled to say: "This is my diary." See 8 Wigmore, Evidence § 2264 (3d ed. 1940). Not so, where the diary is taken from him and authenticated and identified as his by another witness. Not so, either, where the writing is authenticated and identified as his by one who saw him write it, or where he is compelled to make the specimen at his trial. In the latter case the tribunal knows it is his, not by means of any "testimony" by him, explicit or implied, but because the tribunal sees him make it.

In *State v. Mayer*, 154 Wash. 667, 283 Pac. 195 (1929), supra note 6, the Washington court also missed the essential point: "We are of the opinion that, when Mayer so made these samples of his handwriting before the jury he was, in legal effect, testifying in his own behalf just as if he had made such samples out of the presence of the jury and then brought them into the presence of the jury and there testified that they were samples of his handwriting." Id. at 671, 283 Pac. at 197. In his comment on the Mayer case, Hilling effectively disposes of this: "The court said that it was as though Mayer had testified, 'See, this is my writing.' But it is submitted that that is just what it is *not*. The jury could see for themselves." Hilling, supra note 6, at 107. There seems to be no difference, in principle, between compelling handwriting and compelling one to stand, to speak for identification, to be fingerprinted, to be measured, to exhibit a scar or to don clothing. The writing is merely a kind of bodily exhibition, that is to say, an exhibition of physical style or characteristics, and thus, without the privilege which, by the prevailing view, is limited to protection against "testimonial" compulsion.

¹¹ *United States v. Eggers*, 3 USCA 191, 197-98, 11 CMR 191, 197-98 (1953). This is very difficult to understand. So far as the co-operation being "active" or "passive" is concerned, is there any essential difference between being required to write and being required to put one's foot in a footprint, to take off clothing, to stand up for identification? "That he may in such cases be required sometimes to exercise muscular action—as when he is required to take off his shoes or roll up his sleeve—is immaterial,—unless all bodily action were synonymous with testimonial utterance; for, as already observed, not compulsion alone is the component idea of the privilege, but testimonial compulsion." 8 Wigmore, Evidence 375 (3d ed. 1940). It is true that there are a few state cases which appear to draw a somewhat similar sort of distinction. Thus, in *State v. Griffin*, 129 S.C. 200, 124 S.E. 81 (1924), the court held admissible the sheriff's testimony that he compelled the accused to take off her shoe and found that it "fitted the track," but held inadmissible the sheriff's testimony that he compelled the accused to put her foot in the track and that "she would not do it the right way." Wigmore's comment on the Griffin case: "the opinion says nothing to answer the question whether the well-known distinction between Tweedle-dum and Tweedle-dee was analogous." 8 Wigmore, Evidence 386 n.2 (3d ed. 1940).

So the *Manual* "is of no effect" and the law officer erred in admitting the specimens.¹²

Refusal to Submit to Sobriety Test.—On an appeal from a municipal court conviction in a drunken driving case, the Appellate Department of the Los Angeles Superior Court held¹³ that the trial court had not erred in admitting evidence to the effect that defendant, when arrested, "declined to comply with the police officers' request that he submit himself to an intoximeter test." While the jury "might not have been persuaded that it was fear of the result that dictated defendant's refusal," nevertheless, "we are not prepared to say that it would do 'violence to reason' for the jury to conclude that the defendant refused to take the test because he did not want to run the risk that the test would furnish evidence of the condition in which he knew himself to be."¹⁴ Thus it was admissible as some evidence of a guilty consciousness. There is a sort of an implication in the opinion that defendant "may have the right to refuse to subject himself to . . . the intoximeter test," but it seems pretty clear that any such holding would be inconsistent, on principle, with the result at which the court arrived. The only conceivable objection to the evidence, it would seem, is the self-crimination privilege. If the suspect may be compelled to submit to the test, because not within the privilege, then there would seem to be no sound objection to the admissibility of evidence of his refusal to submit when given a choice. If, on the other hand, he cannot be compelled, then it would seem to follow that his refusal, essentially a claim of privilege, ought not be used against him. But it is very clear, under the California rule, that compulsory administration of a breath test is not within the privilege.¹⁵

Is Revocation of Architect's Certificate a "Penalty or Forfeiture" within Protection of Immunity Statute?—A licensed architect testified before a grand jury which indicted certain members of the Board of Public Instruction for bribery in connection with the award of a contract to the architect. He likewise testified at the trial of those indicted. An immunity statute protected one so testifying not only

¹² In *State v. Smith*, 91 A.2d 188 (Del. Super. 1952), the Superior Court of Delaware, in ruling on a motion to suppress, held not violative of the defendant's privilege a compulsory "sobriety test" which included "the writing of his name." "Since testimonial compulsion and not compulsion alone is the component idea of the privilege," said the court, "compulsory examinations of accused persons beyond the field of oral examinations, or the equivalent thereof, either before or upon their trial do not violate the privilege, for the simple reason that such examinations do not call upon the accused persons as witnesses; that is, upon their testimonial responsibility." *Id.* at 192. Noted in 5 *Baylor L. Rev.* 295 (1953); 16 *U. of Detroit L.J.* 146 (1953).

¹³ *People v. McGinnis*, 22 U.S.L. Week 2245 (Cal. App. Dec. 8, 1953).

¹⁴ *Ibid.*

¹⁵ See *People v. Hacussler*, 260 P.2d 8 (Cal. 1953), p. 762 *infra*.

from prosecution but from the imposition of "any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may so testify."¹⁶ Subsequently, the Board of Architecture filed charges against the architect-witness seeking to revoke his certificate because of the payment of the bribes. The Florida Supreme Court held the architect immune from the cancellation of his certificate.¹⁷ "A penalty," said the court, "generally has reference to punishment imposed for any offense against the law. . . . A forfeiture is also a penalty and has to do with the loss of property, position or some other personal right for failure to comply with the law. The right to earn a living including other personal rights are protected by the immunity statute."¹⁸ The holding seems questionable. Whatever the statutory language, the immunity should certainly be no broader than the privilege. And the cases appear to support Wigmore's conclusion¹⁹ that "[while] the process of *impeachment* seems to fall in the former class ['inflicting a punishment'] . . . most other processes of *removal* or restraint (including *disbarment*)²⁰ would ordinarily

¹⁶ Fla. Stat. Ann. § 932.29 (West 1941).

¹⁷ Florida State Board of Architecture v. Seymour, 62 So.2d 1 (Fla. 1952).

¹⁸ Id. at 3. In Application of Delehanty, 202 Misc. 40, 115 N.Y.S.2d 610 (Sup. Ct. 1952), aff'd, 280 App. Div. 542, 115 N.Y.S.2d 614 (1st Dep't 1952), it was held that the respondent, charged with "grave misconduct and corruption" in a departmental trial before the deputy police commissioner, could not refuse to answer questions on the ground that the possibility of the imposition of severe sanctions (e.g., dismissal, loss of pension rights) exposed him to "a penalty or forfeiture" within the meaning of N.Y. Civ. Prac. Act § 355. The respondent did not claim that his answers would tend to "accuse him of a crime." The court said: "The kind of penalty and forfeiture within the meaning of Section 355 . . . imports a sanction essentially criminal in nature. . . . This disciplinary trial is not a criminal proceeding; nor are the sanctions which may be imposed in such a departmental trial considered punishment for crime. The severity of the possible sanction in this kind of proceeding does not alter its essential remedial character. . . ." Id. at 42, 115 N.Y.S.2d at 612. Pätzinger v. United States Civil Service Comm'n, 96 F. Supp. 1 (D.N.J.), aff'd, 192 F.2d 934 (3d Cir. 1951) is to the same effect. On the hearing of a petition for review of an order of the Civil Service Commission terminating petitioner's federal employment because of political activity forbidden by the Hatch Act, he contended that his privilege was violated because he was subpoenaed to appear before an examiner and interrogated about his activities. The court said that the "testimony which the petitioner gave at the hearing . . . was not of such a nature as to expose him to either [criminal prosecution or the imposition of a penalty or forfeiture]. The political activity in which the petitioner admittedly engaged, and concerning which he gave testimony, warranted nothing more than the imposition of a remedial sanction, to wit, removal from his position. The imposition of such a remedial sanction, although it may be of serious consequence to the person affected, may not be regarded as the forfeiture of a right; it is our opinion that it is nothing more than the withholding of a privilege. A person may have a right to qualify for and hold 'public office,' but he has no right to 'public employment'; the latter is nothing more than a privilege which is subject to termination at the will of the employer, subject only to the applicable civil service laws." Id. at 2-3.

¹⁹ 8 Wigmore, Evidence § 2257 (3d ed. 1940).

²⁰ "It is insisted by appellant [the accused in a disbarment proceeding] that the

come within the latter description ['restraining the continued improper exercise of functions']'.²¹

Waiver by Voluntarily Testifying before Grand Jury.—Valentino was indicted for filing a false noncommunist affidavit under the Labor Management Relations Act.²² Sylvia Neff, an office secretary of the union, and a notary public, had taken the affidavit. Before the grand jury which indicted Valentino, Neff answered "a number of questions concerning Valentino." She also answered three questions concerning her own connection with Communist party activities. As a result of her testimony, she was indicted and convicted for perjury. An appeal from this conviction was pending at the time of Valentino's trial. Called as a witness at that trial, she refused to answer questions touching her acquaintance with certain persons, conversations with Valentino concerning the Communist party and her own affiliation with the party. She was held in contempt. The Court of Appeals for the Third Circuit, in setting aside the judgment of contempt, held that possible answers to the questions in the setting in which they were asked might be incriminating and that the witness had not waived her privilege by her voluntary testimony before the grand jury.²³ "It is settled by the overwhelming weight of authority that a person who has waived his privilege of silence in one trial or

court erred in allowing him to be called to the stand and compelled to testify over his objection. He contends the disbarment proceedings are in the nature of a criminal action and that the accused in such a case should be accorded the same right to refuse to testify as is a defendant charged with the commission of a crime. This position cannot be maintained. Although it has been held that an accusation is in the nature of a criminal charge . . . and that a proceeding on such a charge is a quasi-criminal action . . . 'this court has uniformly treated disbarment proceedings as peculiar to themselves, and governed, exclusively by the code sections specifically covering them'. . . . The purpose of such a proceeding is to determine the fitness of an officer of the court to continue in that capacity, and it has been said the disbarment of attorneys is not intended for the punishment of the individual, but for the protection of the courts and the legal profession." *In re Vaughan*, 189 Cal. 491, 495-96, 209 Pac. 353, 354-55 (1922). *Accord*, *Fish v. State Bar*, 214 Cal. 215, 4 P.2d 937 (1931); *In re Randel*, 158 N.Y. 216, 52 N.E. 1106 (1899). See also *In re Rouss*, 221 N.Y. 81, 116 N.E. 782 (1917).

²¹ In a comment on *Florida State Board of Architecture v. Seymour*, 62 So.2d 1 (Fla. 1952) appearing in 7 *Miami L.Q.* 592 (1953) it is said: "Architects are required to possess educational and moral qualifications similar to those of a doctor and lawyer [citing Fla. Stat. Ann. § 467.08 (West 1952)]. It has been reasoned that such positions are not held by inherent right, but are subject to prescribed educational and moral qualifications which must be continued after one has been afforded the privilege to practice. In the instant case, the court reasons that the right to earn a living is protected by the immunity statute. The reasoning in the disbarment cases and the standards to which professional people in general are held would seem to belie this construction." *Id.* at 593-94.

²² 61 Stat. 146 (1947), as amended, 65 Stat. 602 (1951), 29 U.S.C. § 159(h) (Supp. 1952).

²³ *In re Neff*, 206 F.2d 149 (3d Cir. 1953).

proceeding is not estopped to assert it as to the same matter in a subsequent trial or proceeding."²⁴ While not controverting this proposition, the Government sought to avoid its effect by the contention that the grand jury investigation and subsequent trial of Valentino were merely two successive phases of a single proceeding so that Neff's waiver of her privilege in the one carried through to the other. The court said that while this precise question "[had] not heretofore been presented to a federal appellate court," it was satisfied to follow the rule applied by the state courts without exception, namely, "that the investigation of a grand jury is a proceeding which is wholly separate and distinct from, and of a different nature than, the subsequent trial of the defendant . . ." Thus, a witness who testifies to a matter before a grand jury does not on that account waive his right to claim the privilege as to the same matter when called to testify at the trial of one indicted by the grand jury.²⁵

II

THE ROCHIN DOCTRINE²⁶

Two recent cases concern the applicability of the *Rochin* rule to the forcible administration of alcoholic tests to drunken driving suspects. In *People v. Haussler*,²⁷ the Supreme Court of California affirmed a conviction for "manslaughter in the driving of a vehicle" and for drunken driving where there had been admitted evidence of the analysis of a blood specimen taken from the defendant while unconscious in a hospital shortly after the accident. Five cubic

²⁴ *Id.* at 152. Inconsistently, it would seem, the Supreme Court has held that voluntary testimony by an accused at a second trial operates as a waiver retroactively, in the sense that he may be compelled on cross-examination to disclose that he had not testified at the first trial and to explain why he had not done so. *Raffel v. United States*, 271 U.S. 494 (1926).

²⁵ The court added: "Indeed [Neff's] case is a striking illustration of the importance of the rule in preserving the . . . privilege. . . . For between the time of the defendant's testimony before the grand jury and her claim of privilege at Valentino's trial she had been convicted of perjury before the grand jury and had been sentenced to a total of ten years' imprisonment. Thus the setting in which the questions were asked of her had greatly changed and she could well have had apprehensions as to the incriminating effect of her requested testimony which she did not have on the earlier occasion." In *re Neff*, 206 F.2d 149, 152-53 (3d Cir. 1953). Appraised in the light of the fact that an appeal was pending from the conviction, this seems sound because of the possibility of a retrial of the perjury charge. The situation would be quite different, of course, had the perjury conviction become final. When further criminal liability is impossible, the privilege ceases. 8 Wigmore, Evidence § 2279 (3d ed. 1940). However, discharge of liability on the perjury charge would not remove the danger of criminal liability under the Smith Act. See *Blau v. United States*, 340 U.S. 159 (1950).

²⁶ *Rochin v. California*, 342 U.S. 165 (1952). See 1951 Annual Surv. Am. L. 840.

²⁷ 260 P.2d 8 (Cal. 1953).

centimeters of blood were withdrawn; "four of these were used to type her blood for a transfusion. The remainder was given to a laboratory technician for analysis." It was defendant's contention that the admission in evidence of the analysis of the blood, taken without her consent, was a denial of due process under the *Rochin* rule. But the court held otherwise²⁸ in an opinion which carefully, and it is believed accurately, delineates the scope of the *Rochin* rule.²⁹ "The essence of the *Rochin* decision," said the California court, "is in the court's reference to *Brown v. State of Mississippi* . . . and other coerced confession cases." The due process clause of the Fourteenth Amendment requires the rejection of involuntary confessions in state prosecutions "not only because of their unreliability" but as well because "coerced confessions offend the community's sense of fair play and decency." "In brief," said the California court, "the *Rochin* case holds that brutal or shocking force exerted to acquire evidence [however trustworthy] renders void a conviction based wholly or in part upon the use of such evidence." But

the taking of a blood test, when accomplished in a medically approved manner, does not smack of brutality. In recent years, millions of young men have been subjected to such tests as an incident to induction into military service. In this state, a blood test is required of each person making application for a marriage license. . . . and physicians engaged

²⁸ The district court of appeal had held the *Rochin* rule violated. 248 P.2d 434 (Cal. App. 1952). See 1952 Annual Surv. Am. L. 741 n.78, 28 N.Y.U.L. Rev. 831 n.78 (1953).

²⁹ The court took occasion to reaffirm its prior holdings to the effect that the self-crimination privilege is limited to protection against "testimonial" compulsion. And "evidence is not obtained by testamentary compulsion where it consists of a test of blood taken from an accused. [This] is not a communication from the accused but real evidence of the ultimate fact in issue—the defendant's physical condition." (Citing, among other cases, *State v. Cram*, 176 Ore. 577, 160 P.2d 283 (1945)). "Similarly, real evidence obtained from a defendant's stomach by use of an emetic is not violative of the privilege. . . ." And "despite contrary suggestions," the *Rochin* decision does not rest on the privilege, said the court, nor does it overrule or limit the rule of *Twining v. New Jersey*, 211 U.S. 78 (1908) and *Adamson v. California*, 332 U.S. 46 (1947), excluding the privilege from the protection of the due process clause of the Fourteenth Amendment. The court also emphasized that "without deviation" California had adhered to the dominant state view that evidence otherwise competent is not rendered inadmissible by illegality in the means by which it was obtained and that this rule does not transgress the due process clause of the Fourteenth Amendment. *Wolf v. Colorado*, 338 U.S. 25 (1949). The basis for the *Rochin* rule, said the court, "is not that the evidence was acquired illegally. Reversal of the judgment [against *Rochin*] upon that ground would have been contrary to the *Wolf* case, and it is not to be supposed that the Supreme Court would make such a startling change in constitutional doctrine without mention of that decision." 260 P.2d 8, 11-12 (Cal. 1953). In view of the above, the present writer is prompted to repeat his prior comment on the *Rochin* case: "In the last analysis the *Rochin* case seems to represent a fairly unconvincing attempt to avoid carrying the *Wolf* and *Adamson* cases to their logical conclusion." 1951 Annual Surv. Am. L. 843 n.22.

in prenatal care of a pregnant woman, or attending such woman at the time of delivery, must obtain a sample of her blood for purposes of a test for venereal disease. . . . Moreover, in the present case, Mrs. Haeussler was unconscious at the time the blood was withdrawn, and the removal of four of the five cubic centimeters was necessary to provide medical treatment. The only unauthorized action of the medical attendant was to remove one additional cubic centimeter of blood after the hypodermic needle already had been inserted. Certainly, this conduct cannot be characterized as shocking to the conscience, and it does not support Mrs. Haeussler's claim of a violation of due process of law.⁸⁰

Two judges dissented. They thought that "the forcible taking of blood for the purpose of making a blood test to use in evidence against that person 'shocks the conscience . . . [and] is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw. . . .'"⁸¹

In an Arizona case⁸² the question was whether the results of a drunkometer test are admissible in evidence where the evidence discloses the specimen of breath was forcibly taken from the defendant over his objection. The defendant, after a legal arrest, refused to submit to the test. "[I]n order to procure the breath specimen . . . it was necessary that he be forcibly placed in restraining straps and that his head be forcibly held during the taking of the breath specimen." There were no further details in the stipulated facts and the court said that with the record in this "incomplete and unsatisfactory" condition, "it cannot be determined therefrom if the breath was forced from the lungs . . . in some brutal manner or if it was forced to be retained in the lungs and permitted to escape only through some device clamped over the mouth and nostrils of the defendant or in some other unlawful or inhuman manner by the use of force."⁸³ Answering a question certified by the trial court, the Supreme Court of Arizona said that evidence of the result of a forcible drunkometer test was admissible "if the force is used in capturing the exhaled breath after it passes the lips or nose of defendant." By the Arizona rule, illegality in the means by which evidence is obtained does not make it inadmissible; nor does the forcible taking of a breath specimen violate the self-crimination privilege, which is limited to protection against "testimonial" compulsion; as to the claim of violation of the section of the Arizona Constitution providing that "no person shall be disturbed in his private affairs . . . without authority of law,"⁸⁴ the court said:

⁸⁰ *People v. Haeussler*, 260 P.2d 8, 12-13 (Cal. 1953).

⁸¹ *Id.* at 15.

⁸² *State v. Berg*, 259 P.2d 261 (Ariz. 1953).

⁸³ *Id.* at 262-63.

⁸⁴ *Ariz. Const. Art. II, § 8.*

He was not forced to exhale breath from his lungs. He exhaled it voluntarily and in fact of necessity in order to survive. The moment his breath passed his lips it was no longer his to control but became a part of the surrounding atmosphere which was equally free for use by anyone present within the orbit of its immediate circulation. Officers making the arrest had the lawful right to capture his breath after it left his body for use as evidence in procuring his conviction of drunk driving if in the process of doing so they made no invasion of his person. So long as they limited their operation to the capture of his breath after it left his body by means, which only slightly interfered³⁵ temporarily with his freedom of action he had no legal right to obstruct their efforts. If he did obstruct them they had the right to use such force upon defendant as appeared to be reasonably necessary to overcome such interference. Such a process, if not resisted by defendant, involves less restraint upon his person than finger-printing him.³⁶

As to the *Rochin* case, the court merely said that it could "find no similarity whatever in that case to the case at bar. . . . Neither is there any similarity in the instant case with cases cited relating to the taking of blood tests And there is but slight similarity in the instant case to cases cited by defendant where urinalysis was made and used as evidence against the defendant."³⁷

In a recent illuminating comment by a Canadian lawyer,³⁸ attention is called to two recent Canadian cases which he deems to be at odds with the *Rochin* holding. In *Rex v. McIntyre*,³⁹ decided at about the same time as the *Rochin* case, the Supreme Court of Alberta holds admissible evidence of the analysis of a blood sample, although obtained without the consent of the accused and "without warning," and "even though it was improperly obtained under circumstances which would give the accused a right of action or prosecution for trespass to his person." The court said that "neither the supposed analogy between the admission of such evidence and the admission of confessions nor the supposed privilege against self-incrimination nor the supposed inviolability of the person of the accused constitutes a sound reason for its exclusion."⁴⁰ And in *Rex v. Brezack*⁴¹ the

³⁵ The court cited *United States v. Kelly*, 35 F.2d 67 (2d Cir. 1932), where it was said: "Any restraint of the person may be burdensome. But some burdens must be borne for the good of the community. . . . The slight interference with the person involved in finger printing seems to us one which must be borne in the common interest." *Id.* at 68.

³⁶ *State v. Berg*, 259 P.2d 261, 265 (Ariz. 1953).

³⁷ *Id.* at 266.

³⁸ Paikin, *Admissibility of Evidence Obtained by Methods that Offend a "Sense of Justice,"* 30 Can. B. Rev. 747 (1952).

³⁹ 102 Can. C.C. 104, 2 D.L.R. 713 (1952).

⁴⁰ *Id.* at 112, 2 D.L.R. at 719.

⁴¹ 96 Can. C.C. 97, 2 D.L.R. 265 (1950).

Ontario Court of Appeals has taken "the orthodox position" on facts⁴² which the author finds "not dissimilar to those in the *Rochin* case."⁴³

III

THE HEARSAY RULE AND EXCEPTIONS

Admissibility of Public Opinion Polls.—In 1947, the plaintiff, Household Finance Corporation, adopted a trade symbol consisting of the letters "HFC" in a distinctive type style arranged in a distinctive manner and enclosed in a circle. Subsequently, defendant, Federal Finance Corporation, a competitor, adopted a trade symbol consisting

⁴² Summarized by Paikin, *supra* note 38, at 750, as follows: "the accused was arrested on suspicion of having illegal possession of narcotics. Constables rushed upon him from their place of concealment in a public street. One of them seized him by the arms and one caught him by the throat, to prevent him swallowing anything he had in his mouth. The three of them fell to the ground and a considerable struggle ensued. One of the constables persistently tried to insert his fingers in the accused's mouth, to recover the drug he assumed was there, and each time he tried, Brezack bit his finger. A good deal of force was applied by the constables, and finally the accused's mouth was opened and the constables satisfied themselves that there was no drug there. Subsequent search disclosed no narcotics on the accused's person, but narcotic capsules were in fact found in his car nearby. Upon these facts Brezack was charged with unlawfully assaulting a police officer engaged in the lawful execution of his duty, and was convicted. The conviction was upheld, the Court of Appeal noting that the rather zealous search was justifiable as an incident of the arrest, which involved the duty of making reasonable efforts to obtain possession of any narcotics believed to be in the possession of the person arrested." The court said: "It is important to observe that the search that was made is justifiable as an incident of the arrest. . . . A constable may not always find his suspicions to be justified by the result of the search. It is sufficient if the circumstances are such as to justify the search as a reasonable precaution. . . . While, therefore, it is important that constables should be instructed that there are limits upon their right of search, including search of the person, they are not to be encumbered by technicalities in handling the situations with which they often have to deal in narcotic cases, which permit them little time for deliberation and require the stern exercise of such rights of search as they possess." 96 Can. C.C. 97, 101-02, 2 D.L.R. 265, 269-70 (1950).

⁴³ Paikin's comments on the *Rochin* case: "As a question of law, the admissibility of the evidence of blood tests would now seem to be too well settled to merit comment, were it not for an apparent exception recently enunciated by the Supreme Court of the United States in *Rochin v. California*. . . . A Canadian lawyer may be thought to skate upon the thin ice of presumption when he comments upon a decision of the highest court of the United States. With respect, however, it can be submitted that the Supreme Court has used the vague contours of the due process clause to give expression to an exclusionary principle based only upon a sentimental conception of the function of the court, namely, that the court, as the fount of justice, must not entertain before it evidence, no matter how obviously reliable, obtained by breach of law or in a manner offensive to the community's 'sense of justice'. . . . It will be interesting to note what stature the doctrine enunciated in the *Rochin* case will attain. Its critics will undoubtedly be vigorous. . . . Canadian courts could accept *Rochin v. California* only by upsetting *Rex v. McIntyre* and by denying the historical principles of evidence upon which it is based. Such a singular amendment to our laws of evidence properly lies within legislative function." Paikin, *supra* note 38, at 747, 752, 753.

of the letters "FFC," also enclosed in a circle and bearing a striking similarity to plaintiff's symbol. In an action to enjoin defendant's use of the mark, plaintiff offered evidence of the results of a public recognition survey showing that 61 per cent of 4,000 interviewees connected the letters "HFC," in a circle, with the plaintiff. The evidence was held admissible.⁴⁴ The court said that the "admission of such evidence does not violate the rule barring hearsay testimony." If the court means that the evidence was not hearsay, the analysis is clearly incorrect. The basic issue appears to have been whether plaintiff's symbol had acquired a "secondary meaning"; a meaning, that is, in the mind of the public; thus the public's state of mind was in issue. However phrased, the responses of the interviewees were intended by them to describe their state of mind and it seems clear that these collective responses were being used to prove the truth of the matter expressly or impliedly asserted,⁴⁵ namely, what plaintiff's symbol meant to the declarants.⁴⁶ Nevertheless, though hearsay, the evidence

⁴⁴ *Household Finance Corp. v. Federal Finance Corp.*, 105 F. Supp. 164 (D. Ariz. 1952), noted in 37 Minn. L. Rev. 385 (1953).

⁴⁵ In *People v. Franklin Nat. Bank*, 200 Misc. 557, 105 N.Y.S.2d 81 (Sup. Ct. 1951), rev'd on other grounds, 281 App. Div. 757, 118 N.Y.S.2d 210 (2d Dep't 1953), there was held admissible evidence of a public opinion poll tending to reflect the public understanding of the terms "savings," "thrift," "compound interest," and "special interest," as they relate to bank accounts. The Attorney General argued "that the answers of those interviewed as reported by the interviewers, upon which the poll rests for its usefulness, in particular, are pure hearsay." In overruling the objection the trial court appears to have held that the evidence was not hearsay because it was not offered as proof of the truth of what the interviewees said but only to show that they made the statements. But this seems clearly insupportable because the making of the statements (as distinguished from their truth) is in no sense in issue nor is the making of the statements (as distinguished from their truth) in any degree relevant to any material issue. The sole relevancy of the evidence is as proof of the truth of what the interviewees said, namely, their understanding of the meaning and significance of the expressions in question. It is to be noted, however, that in *People v. Franklin Nat. Bank*, supra, the court went on to say that "a party endeavoring to establish the public state of mind on a subject, which state of mind cannot be proved except by calling as witnesses so many of the public as to render the task impracticable, should be allowed to offer evidence concerning a poll which the party maintains reveals that state of mind." *Id.* at 566, 105 N.Y.S.2d at 90-91. The court also said that "the evidence offered should include calling the planners, supervisors and workers (or some of them) as witnesses so that the Court may see and hear them; they should be ready to give a complete exposition of the poll and even its results; the work sheets, reports, surveys and all documents used in or prepared during the poll taking and those showing its results should be offered in evidence, although the Court may desire to draw its own conclusions. In this trial the learned counsel for defendant adduced proof of the kind to which I have just referred. I think that the proof as to the poll should be received in evidence. I also am satisfied that the conclusions drawn therefrom are worthy of some consideration. Plaintiff's objections to the admission of this proof are overruled." *Id.* at 566, 105 N.Y.S.2d at 91.

⁴⁶ In *United States v. 88 Cases*, 187 F.2d 967 (3d Cir. 1951), the Court of Appeals for the Third Circuit likewise failed to analyze adequately the hearsay problem.

seems to qualify, without difficulty, under the exception to the hearsay rule which accommodates contemporary declarations of a relevant or material mental state.⁴⁷ Holmes's succinct identification of the basis for this exception to the hearsay rule probably cannot be improved upon: "We rather agree with Mr. Starkie that such declarations [of one's 'reason' for doing an act, the reason being in issue], made with no apparent motive for misstatement may be better evidence of the maker's state of mind at the time than the subsequent testimony of the same persons."⁴⁸

In a recent Florida case,⁴⁹ defendant, a Negro, upon an appeal from a conviction of the rape of a white woman, claimed error in the denial of a motion for change of venue. Involved in this was his contention that the trial court erred in excluding evidence of the result of a public opinion poll conducted by the Elmo Roper Research and Public Opinion Organization. The questionnaire used included "inquiries about the specific case such as the guilt or innocence of the

In that case (an action to condemn 88 cases of "Bireley's Orange Beverage") the court said that the issue was: "Would the ordinary consumer confuse claimant's product with undiluted orange juice?" The Government offered and there was admitted evidence of surveys which collated answers given by some 3,539 persons "to questionnaires prepared by the government to determine what they thought was contained in the Bireley product." The hearsay objection, said the court of appeals, was unfounded, because "the statements of the persons interviewed were not offered for the truthfulness of their assertions as to the composition of the beverage. They were not offered to prove that Bireley's Orange Beverage is or is not orange juice. They were offered solely to show as a fact the reaction of ordinary householders and others of the public generally when shown a bottle of Bireley's Orange Beverage. Only the credibility of those who took the statements was involved and they were before the court." *Id.* at 974. The error of this reasoning lies in this: presumably each interviewee said, "I believe (or I think) that this bottle contains undiluted orange juice"; obviously, evidence of the utterance is inadmissible to prove the contents of the bottle; but it is not being offered for that purpose; the evidence is being offered and used to prove what the man thinks; specifically, the man's belief that the bottle contains undiluted orange juice is being established by his out-of-court statement that such was his belief; thus it is hearsay.

⁴⁷ "If the courts should classify this evidence as hearsay, the interviewer's testimony should nevertheless be admitted; there is a well-recognized exception to the hearsay rule which allows proof of the declarant's state of mind by hearsay evidence. This exception seems to be based upon a factor which leads the courts in some cases not to classify the evidence as hearsay at all: the necessity for the evidence outweighs the lack of opportunity for cross-examination." Note, Public Opinion Surveys as Evidence: The Pollsters Go to Court, 66 *Harv. L. Rev.* 498 (1953). See also 6 *Wigmore, Evidence* §§ 1725 et seq. (3d ed. 1940); Hinton, States of Mind and the Hearsay Rule, 1 *U. of Chi. L. Rev.* 394 (1934). For additional comment upon the admissibility of evidence of the results of public opinion polls, see Sorensen & Sorensen, The Admissibility and Use of Opinion Research Evidence, 28 *N.Y.U.L. Rev.* 1213 (1953); Consumer Polls as Evidence in Unfair Trade Cases, 20 *Geo. Wash. L. Rev.* 211, 217 (1951).

⁴⁸ *Elmer v. Fessenden*, 151 *Mass.* 359, 24 *N.E.* 208 (1889).

⁴⁹ *Irvin v. State*, 66 *So.2d* 288 (Fla. 1953).

[defendant], the reluctance or timidity of jurors to vote for acquittal." The evidence tendered was that of a "research executive" and of a "field representative" of the Roper Organization, neither of whom had personally conducted any interviews. None of the interviewers was called. The Supreme Court of Florida upheld the exclusion of the evidence. While the court agreed with the defendant that, of necessity, his showing may be "informal and largely based on hearsay," still the use of evidence of this sort would go "far beyond the latitude allowed by the statute and by established procedure."⁵⁰ And in view of the fact that neither of the offered witnesses had conducted any interviews, their testimony would have amounted to "hearsay based upon hearsay."⁵¹

*Conduct as Hearsay.*⁵²—According to the prevailing doctrine, the hearsay rule will exclude, except in a few situations, evidence of conduct, though nonverbal and nonassertive, if its relevancy depends upon inferences from the conduct to the belief of the actor to the truth of the fact believed.⁵³ Such conduct, say the courts, amounts to no more than an "implied assertion" of the fact it is offered to prove and must be excluded wherever an express assertion would be excluded as hearsay.⁵⁴ Because the standard definition of hearsay is in terms limited to "utterances" or "declarations,"⁵⁵ and because evidence of the sort described does not involve an utterance, the hearsay point often (probably more often than not) escapes counsel and, consequently, the court.⁵⁶ Two recent cases illustrate this. In

⁵⁰ *Id.* at 291. The court said that "it seems to us that there is a vast difference between [a survey to elicit information about a household product or commodity] and a demonstration to the court of some overpowering sentiment that would so penetrate the thought of the community as to indicate that twelve persons of the integrity and character to fit them to serve on juries could not be found who could take a solemn oath to decide a case upon legal evidence, and abide by the obligation." *Id.* at 292.

⁵¹ Not only was the testimony inadmissible, said the court, "but its competency was suspect. We need say no more in this regard than quote the supervisor who said, in reply to questions about the survey conducted by his organization prior to the presidential election in 1948, 'in that kind of a survey we were very badly wrong. . . .'" *Ibid.*

⁵² See 1951 Annual Surv. Am. L. 854.

⁵³ Falknor, Silence as Hearsay, 89 U. of Pa. L. Rev. 192 (1941); McCormick, The Borderland of Hearsay, 39 Yale L.J. 489 (1930).

⁵⁴ Wright v. Tatham, 7 Ad. & Ell. 313 (Ex. Ch. 1837), *aff'd*, 5 Cl. & Fin. 670, 7 Eng. Rep. 559 (H.L. 1838).

⁵⁵ 5 Wigmore, Evidence § 1362 (3d ed. 1940).

⁵⁶ "This variety of hearsay (conduct) does not appear to have received much attention in practice. Counsel probably are not alert to recognize as hearsay, evidence in the guise of ordinary mechanical action, and no doubt testimony as to personal conduct is often received without protest, which so far as the issue is concerned only amounts to a voucher of a relevant fact." Tregarthen, *The Law of Hearsay Evidence* 32 (1915).

each, evidence which, analytically, appears to have been hearsay, went in without objection.

In a Washington case,⁵⁷ plaintiff, which held the prime contract for the construction of military installations in Alaska, solicited bids for the necessary millwork. Tacoma Company was the low bidder; defendant the next lowest. But before any bid was let, it developed that the millwork would have to be delivered sooner than originally anticipated. Apparently Tacoma Company was not in a position to furnish all the millwork by the advanced date. It was plaintiff's contention that at a conference between plaintiff, defendant and Tacoma Company it was agreed that the contract for the millwork would be split between defendant and Tacoma Company. The action was for breach of the alleged contract, the making of which defendant denied. In holding that the trial court erred in granting defendant's motion for nonsuit, the court made reference to evidence (apparently admitted without objection) tending to show that after the conference the Tacoma Company "immediately went to work making the part of the millwork which it considered it was obligated to deliver as a result of the agreement reached at the conference." This is hearsay by the rule of most cases where the hearsay point has been identified and raised: hearsay because it is simply an implied (out-of-court, uncross-examined) assertion of the Tacoma Company that the alleged contract had been made.

A California homicide case⁵⁸ concerned the admissibility of a confession. Defendant was found by the California police in Arizona about a month after the homicide, escaped when they attempted to arrest him, and was found the next day lying in a field; he had slashed his throat and wrists. A confession, made the following day in the hospital, was objected to on the ground that it had not been shown that defendant "was in a mental and physical condition to make a rational and coherent statement." In holding the admission of the confession not error, the Supreme Court of California emphasized, among other circumstances, the fact that "he was questioned only with the permission of the hospital attendants."⁵⁹ Here again, it seems

⁵⁷ *Gaasland Co. v. Hyak Lumber Co.*, 42 Wash.2d 705, 257 P.2d 784 (1953).

⁵⁸ *People v. Harrison*, 258 P.2d 1016 (Cal. 1953).

⁵⁹ In the leading English case, *Wright v. Tatham*, 7 Ad. & Ell. 313, 388 (Ex. Ch. 1837), Baron Parke said: "[Other instances] were supposed on the part of the plaintiff in error, which, at first sight, have the appearance of being mere facts, and therefore admissible, though on further consideration they are open to precisely the same objection. . . . To [this class] belong the supposed conduct of the family or relations of a testator, taking the same precautions in his absence as if he were a lunatic; his election, in his absence, to some high and responsible office; the conduct of a physician who permitted a will to be executed by a sick testator; the conduct of a deceased captain on a question of seaworthiness, who, after examining every part of

clear that the permission given by the "hospital attendants" (here probably actually "assertive") would by the orthodox rule be deemed objectionable hearsay as merely an "implied assertion" that the patient was in a condition to be questioned. And just as evidence of an express assertion to the same effect would undoubtedly be excluded as hearsay, so must this evidence of conduct.⁶⁰

"Substantive" Use of Prior Inconsistent Statement of Nonparty Witness.—Defendant was charged with carnal knowledge of his daughter. Called by the prosecution, she denied having sexual relations with her father. She admitted having given the prosecutor a signed statement to the contrary, but she testified it was not true. There was no other evidence of the crime and the conviction was reversed.⁶¹ Although the Attorney General urged the Supreme Court of Arkansas to overrule its earlier decisions adhering to the orthodox rule that a prior inconsistent statement of a nonparty witness is without substantive value, the court declined to do so. The court took cognizance of Wigmore's final position that a witness' prior inconsistent statement ought, on principle, be admitted not only to discredit witness' testimony, but also as "affirmative testimonial" evidence because "by hypothesis the witness is present and subject to cross-examination,"⁶² but said that while it appreciated "the abstract logic of Wigmore's argument . . . there are practical objections to adopting his reasoning in its entirety." Under such a rule, the court thought, "an entire accusation, such as a charge of rape, could be fabricated merely by first having the prosecutrix emphatically deny the truth of the charge and by then calling another witness to say that the prosecutrix had made a contrary statement on some other occasion." Moreover, said the court, "we are not persuaded that the opportunity to cross-examine months or years later is equally as valuable or equally as effective as the exercise of that privilege when the facts are much fresher in the memory of the witness." Doubtless there are arguments both ways, but "when the arguments are this closely balanced, we think the

the vessel, embarked in it with his family; all these, when deliberately considered, are, with reference to the matter in issue in each case, mere instances of hearsay evidence, mere statements, not on oath, but implied in or vouched by the actual conduct of persons by whose acts the litigant parties are not to be bound." (Emphasis supplied.)

⁶⁰ The Model Code of Evidence would discard completely the so-called "hearsay conduct" rule. Model Code of Evidence, Rule 501 (1942). As would the Uniform Rules of Evidence recently approved by the National Conference of Commissioners on Uniform State Laws. Uniform Rules of Evidence, Rule 62(1) (1953).

⁶¹ *Comer v. State*, 257 S.W.2d 564 (Ark. 1953).

⁶² 3 Wigmore, Evidence § 1018 (3d ed. 1940). In his first edition, Wigmore approved the "orthodox view." In the later editions, however, he said that "further reflection . . . has shown the present writer that the natural and correct solution is the one set forth in the text above." 3 id. § 1018 n.2.

advantage of certainty in the law should tip the scales in favor of the rule of *stare decisis*.⁶³

Declarations against Penal Interest.—In an Illinois homicide prosecution,⁶⁴ defendant offered but the trial court rejected evidence that "another person had confessed this same murder" to "the director of the behavior clinic of Cook County." While recognizing that "the general rule, supported by the great weight of authority,⁶⁵ is that extrajudicial declarations of a third party, not made under oath, that he committed the crime, are purely hearsay and . . . are inadmissible," and while agreeing that "the rule is sound and should not be departed from except in cases where it is obvious that justice demands a departure," the Supreme Court of Illinois nevertheless held that "it would be absurd, and shocking to all sense of justice,⁶⁶ to indiscriminately apply such a rule to prevent one accused of crime from showing⁶⁷ that another person was the real culprit merely because that other person was deceased, insane or outside the jurisdiction of the court."⁶⁸ And "under the special circumstances of the instant

⁶³ The Model Code of Evidence and the Uniform Rules of Evidence adopt Wigmore's view: "Evidence of a hearsay declaration is admissible if the judge finds that the declarant . . . is present and subject to cross-examination." Model Code of Evidence, Rule 503(b) (1942). "Evidence of a statement which is made other than by a witness while testifying at the hearing offered to prove the truth of the matter stated is hearsay evidence and inadmissible except: (1) a statement previously made by a person who is present at the hearing and available for cross-examination with respect to the statement and its subject matter, provided the statement would be admissible if made by declarant while testifying as a witness." Uniform Rules of Evidence, Rule 63(1) (1953). The Conference Committee commented as follows on this Uniform rule: "When sentiment is laid aside there is little basis for objection to this enlightened modification of the rule against hearsay."

⁶⁴ *People v. Lettrich*, 413 Ill. 172, 108 N.E.2d 488 (1952), 6 Vand. L. Rev. 924 (1953).

⁶⁵ The cases are collected in Note, 162 A.L.R. 446 (1946). Both the Model Code of Evidence (Rule 509) and the Uniform Rules (Rule 63[10]) would bring declarations against penal interest within the scope of the exception to the hearsay rule accommodating "declarations of fact against interest."

⁶⁶ Wigmore says that the orthodox rule rejecting declarations against penal interest is "shocking to the sense of justice," "barbarous"; "the truth is that any rule which hampers an honest man in exonerating himself is a bad rule, even if it also hampers a villain in falsely passing for an innocent." 10 Wigmore, Evidence § 1477 (3d ed. 1940). In his dissent in *Donnelly v. United States*, 228 U.S. 243, 278 (1913), Mr. Justice Holmes said "no other statement is so much against interest as a confession of murder; it is far more calculated to convince than dying declarations, which would be let in to hang a man; and when we surround the accused with so many safeguards, some of which seem to me excessive, I think we ought to give him the benefit of a fact that, if proved, commonly would have such weight."

⁶⁷ Of course, the orthodox rule does not prevent the accused from "showing" that not he but another was the guilty man. He may exonerate himself in this fashion provided he can do so by competent evidence. The rule in question merely prohibits such an attempt by means of inadmissible hearsay.

⁶⁸ *People v. Lettrich*, 413 Ill. 172, 178, 108 N.E.2d 488, 491-92 (1952). This

case justice demands a departure from the rule." The "special circumstances," as identified by the court, were the fact that the defendant contended *his* confession was induced by duress and fear and the further circumstance that his confession did not "coincide with many of the known facts and cannot be entirely true." In this context, "it seems that justice requires that the jury consider every circumstance which reflects upon the reliability of that confession, and a confession of a third person that he perpetrated the offense is such a circumstance."⁶⁹

Declarations of Coconspirator.—Rejecting the defendant's contention that the criterion of admissibility of a declaration of a co-conspirator is "the making" and that the statement can only come in if "the making" is itself in "furtherance of the conspiracy,"⁷⁰ the United States District Court for Delaware⁷¹ holds that "a statement

is very difficult to understand. Certainly the prohibition does not rest on unavailability; rather, unavailability is requisite to the applicability of the "declaration against interest" exception to the hearsay rule. The statement would make much more sense if "when" were substituted for "merely because."

⁶⁹ *Id.* at 179, 108 N.E.2d at 492. The traditional doctrine rejecting declarations against penal interest has been relaxed in a number of other fairly recent decisions. *Brennan v. State*, 151 Md. 265, 134 Atl. 148 (1926); *Thomas v. State*, 186 Md. 446, 47 A.2d 43 (1946); *Newberry v. Commonwealth*, 191 Va. 445, 61 S.E.2d 318 (1950); *Osborne v. Purdome*, 250 S.W.2d 159 (Mo. 1952); *Sutter v. Easterly*, 354 Mo. 282, 189 S.W.2d 284 (1945). *Contra*: *Newton v. State*, 61 Okla. Crim. Rep. 237, 71 P.2d 122 (1937); *Rushing v. State*, 88 Okla. Crim. Rep. 82, 199 P.2d 614 (1948); *Bryant v. State*, 197 Ga. 641, 30 S.E.2d 259 (1944); *Commonwealth v. Antonini*, 165 Pa. Super. 501, 69 A.2d 436 (1949), 1950 Annual Surv. Am. L. 827. The rule in Texas appears to be that a third-party confession is admissible where the prosecution is relying solely upon circumstantial evidence, when the guilt of the third party is inconsistent with the guilt of the accused, and when the facts show that the third party was so situated that he might have committed the crime. See *Ballew v. State*, 139 Tex. Crim. Rep. 636, 141 S.W.2d 654 (1940). In *Cameron v. State*, 153 Tex. Crim. Rep. 29, 217 S.W.2d 23 (1949), the Texas court held inadmissible evidence of a statement by a third party (Armstrong) that he and not the accused had committed the crime because there was "no showing that Armstrong was so situated that he might have committed the burglary."

⁷⁰ In *Krulewicz v. United States*, 336 U.S. 440 (1949), the Supreme Court stated the rule as follows: "It is firmly established that where made in furtherance of the objectives of a going conspiracy, such statements are admissible as exceptions to the hearsay rule. This prerequisite to admissibility, that hearsay statements by some conspirators to be admissible against others must be made in furtherance of the conspiracy charged, has been scrupulously observed by federal courts." *Id.* at 443-44. (Emphasis supplied.) In his comment on Model Code of Evidence, Rule 508, Professor Morgan states: "Clause (b) [of Rule 508] does not accept the rule as generally stated with reference to declarations of co-conspirators . . . which holds the declaration inadmissible unless made in furtherance of the conspiracy. Numerous decisions, however, receive against one conspirator evidence of a statement made during the conspiracy by a co-conspirator concerning the conspiracy, despite the lack of a showing that the statement was made in furtherance of the conspiracy. With these Clause (b) agrees."

⁷¹ In *United States v. E. I. Du Pont de Nemours & Co.*, 107 F. Supp. 324 (D. Del. 1952).

by a coconspirator to a third party concerning some act done in furtherance of the conspiracy is admissible although the actual making of the statement in no way furthered the conspiracy."⁷² The Model Code of Evidence⁷³ and the Uniform Rules of Evidence⁷⁴ are in accord.

*Former Testimony ("Mutuality").*⁷⁵—Plaintiff, a seaman on the Exmouth (American Export Lines), was injured when it collided with the Hellenic Beach (Hellenic Lines). He brought suit against both ship lines, alleging that the collision was caused by the concurrent negligence of both defendants. In the course of a pre-trial conference, a question arose as to the admissibility in behalf of plaintiff and of defendant Hellenic of certain depositions of the crew of the Hellenic Beach which had been taken by Hellenic in a previous suit in admiralty brought by Hellenic against Export for damages sustained by the Hellenic Beach in the collision. Over Export's objection the depositions were held admissible.⁷⁶ The court, in effect, rejected the traditional specific requirement of complete identity of parties and the so-called "mutuality" or "reciprocity" principle;⁷⁷ although plaintiff was not a party to the admiralty proceeding and thus, presumably, the depositions would not have been admissible against him, they are admissible, held the court, against a party (Export) who was afforded an adequate opportunity to cross-examine on the prior occasion.⁷⁸ Identity of opponent is enough⁷⁹ if there is substantial

⁷² *Id.* at 325. In *International Indemnity Co. v. Lehman*, 28 F.2d 1, 4 (7th Cir. 1928), the Court of Appeals for the Seventh Circuit said: "Construing the expression 'in furtherance of the conspiracy' reference is not to the admission as such, but rather to the act concerning which the admission is made; that is to say, if the act or declaration, concerning which the admission or declaration is made, be in furtherance of the conspiracy, then it may be said that the admission is in furtherance of the conspiracy."

⁷³ Rule 508.

⁷⁴ Rule 63(9).

⁷⁵ See 1952 Annual Surv. Am. L. 739, 28 N.Y.U.L. Rev. 829 (1953).

⁷⁶ *Rivera v. American Export Lines*, 13 F.R.D. 27 (S.D.N.Y. 1952), noted in 5 Stan. L. Rev. 535 (1953).

⁷⁷ See *Metropolitan St. Ry. v. Gumby*, 99 Fed. 192 (2d Cir. 1900); *McInturff v. Insurance Co. of North America*, 248 Ill. 92, 93 N.E. 369 (1910). In the *Gumby* case it was said that "testimony of a witness on a former trial cannot be admitted against one of the parties to a subsequent trial unless it could have been admitted against the other." *Metropolitan St. Ry. v. Gumby*, *supra* at 198.

⁷⁸ In support of its ruling, the court cited *Mid-City Bank & Trust Co. v. Reading Co.*, 3 F.R.D. 320 (D.N.J. 1944) and *Insul-Wool Insulation Corp. v. Home Insulation, Inc.*, 176 F.2d 502 (10th Cir. 1949). The court thought that *Wolf v. United Airlines, Inc.*, 12 F.R.D. 1 (M.D. Pa. 1951), 1952 Annual Surv. Am. L. 739, 28 N.Y.U.L. Rev. 829 (1953), was distinguishable on the facts.

⁷⁹ Neither the Model Code of Evidence (Rule 511) nor the Uniform Rules of Evidence (Rule 63 [3]) require even identity of opponent. Under the Uniform rule former testimony given as a witness in another action or in a deposition taken for use

identity of issue, and the court held that the issue was substantially the same. "In the taking of the depositions, the cross-examination by Export's counsel was undoubtedly designed to show that Hellenic was negligent and that Export was not. That is exactly what counsel for Export would attempt to show if he examined the same witnesses with respect to this action."⁸⁰ The court attached no significance to the circumstance that plaintiff's contributory negligence was not in issue in the prior action because it was quite clear that the members of the Hellenic crew whose depositions had been taken could have had no personal knowledge of the facts touching that issue.⁸¹

Admissions.—In a New Jersey prosecution for driving while drunk,⁸² where apparently there was no direct evidence that the defendant was driving the car, there was admitted evidence of defendant's admissions to police officers made both at the scene of the accident and later at police headquarters that he was driving the car and that "there were no [other] occupants in the car." The defendant contended this was error because "he was in such a drunken condition, as proved by the State,"⁸³ he could not be held accountable

as testimony in the trial of another action would be admissible (though there is no identity of opponent) if "the issue is such that the adverse party on the former occasion had the right and opportunity for cross-examination with an interest and motive similar to that which the adverse party has in the action in which the testimony is offered." This is in accord with Wigmore's view. "The requirement of identity of parties," he says, "is after all only an incident or corollary of the requirement as to identity of issue." It is his position that regardless of identity of parties on either side it ought to be sufficient to inquire "whether the former testimony was given upon such an issue that the party-opponent in that case had the same interest and motive in his cross-examination that the present opponent has." 5 Wigmore, Evidence § 7388 (3d ed. 1940).

⁸⁰ *Rivera v. American Export Lines*, 13 F.R.D. 27, 29 (S.D.N.Y. 1952).

⁸¹ It has been suggested, Note, 5 Stan. L. Rev. 535 (1953), that the court in *Rivera v. American Export Lines*, 13 F.R.D. 27 (S.D.N.Y. 1952) failed to consider "at least two important distinctions in the two actions" bearing upon the adequacy of Export's opportunity to cross-examine the deponents so far as issues in the second action were concerned. The writer calls attention to the fact that in the admiralty action the rule of damages provides for an equal division of damages if there is mutual fault, viz., the damages are not apportioned according to the degree of fault of each party. Accordingly, he says, "the cross-examination [in the admiralty suit] would be aimed at showing no fault at all since any fault would subject the defendant to an equal division of damages"; whereas in the seamen's action "a rule of comparative fault is applied." Thus, he says, the cross-examination in the second action "would be aimed at establishing the degree of negligence. Cross-examination in such a case could conceivably take a different approach from that followed in the prior admiralty collision action, where it was 'all or nothing.'" The other suggested "distinction" would seem to be more substantial. He calls attention to the fact that there is no jury trial in admiralty actions whereas under the Jones Act the seaman has a choice: he may sue on the civil side and demand a jury trial or he may sue in admiralty. Thus, "cross-examination by [Export] when the depositions were taken for the admiralty collision action might have been different had [Export] known they were to be used in a later jury trial."

⁸² *State v. Johnson*, 23 N.J. Super. 304, 93 A.2d 27 (App. Div. 1952).

⁸³ Defendant's story was that he had given a ride to a hitchhiking soldier, that

for his admission that he had been driving the automobile." But the court held otherwise. "The most that can be said for defendant's argument is that, at best, his drunken condition merely raised a question as to the weight to be given the admissions."⁸⁴

In an Iowa prosecution⁸⁵ for driving while drunk, "third offense," while proof was being offered of the first previous conviction charged, "defendant's counsel admitted both of the convictions as charged." Upon the basis of this concession, the trial judge submitted to the jury but two forms of verdict: (1) guilty of a third offense, and (2) not guilty. On appeal from a conviction the defendant argued that "there should be some affirmative showing in the record that [his] attorney upon the trial had authority to make such an admission." But the court rejected this contention. The stipulation was made in defendant's presence during the trial and "he interposed no objection thereto and it is presumed to have been made with his consent."

In an action by a passenger for personal injuries sustained in the crash of defendant's airplane,⁸⁶ the Court of Appeals for the Second Circuit was concerned with the admissibility, as admissions of the defendant, of portions of the testimony given at a Civil Aeronautics Board investigation of the accident by defendant's superintendent of line maintenance. The trial judge excluded the evidence because the superintendent's "authority to make admissions of this character on behalf of defendant was not shown." Although sustaining the exclusion on other grounds, the court of appeals rejected the reasoning of the trial judge. While the superintendent's powers "anent the CAB hearing" were not fully developed and while the court did not think that an "intramural report" of the superintendent stating that he had been assigned to represent defendant at the hearing was adequate proof of authority, the court nevertheless said that "the circumstances were such that a person of some authority needed to be designated for the company at the hearing and no one appears to be more appropriate than the supervising superintendent of the maintenance in question at the hearing. We think it not in the public interest to allow an airplane company in these matters of general importance and passenger safety to hide behind a lack of authority in its appointed representatives. . . . Here the circumstances suggest a *prima facie* authority which was nowhere rebutted. . . ."⁸⁷

when he stopped for a red light he was struck a blow in the back of the head and that "from then on he had no recollection of anything" until he found himself in the custody of the police following the accident.

⁸⁴ State v. Johnson, 23 N.J. Super. 304, 308, 93 A.2d 27, 29 (App. Div. 1952).

⁸⁵ State v. Ganaway, 55 N.W.2d 325 (Iowa 1952).

⁸⁶ Lobel v. American Airlines, 205 F.2d 927 (2d Cir. 1953).

⁸⁷ Id. at 929.

Conduct as Admission: Spoliation of Relevant Document.—It was held by the Chancery Court of Delaware⁸⁸ that while evidence of spoliation of a relevant document by the defendant is admissible against him, still "the effect of spoliation . . . is persuasive rather than probative and cannot be invoked as substantial proof of facts concerning which there is no testimony but which are essential to plaintiff's case."⁸⁹ Accordingly, the vice-chancellor concluded that he could not accept the fact of spoliation "as sufficient evidence to contradict the testimony of plaintiff's own witnesses and to supply an omission as to which the record is wholly silent."

Confessions: Effect of Trick or Deception.—The engineer and fireman were killed when a train was derailed and wrecked as the result of the removal of a number of spikes and tie plates. The penal code of Pennsylvania makes the wilful and malicious removal or displacement of a rail murder in the first degree where the tampering results in death. Because defendant had been involved in similar conduct on a prior occasion, the Pennsylvania officers sought him and found him in South Carolina where he "was being held in jail for illegal entry." Released by the South Carolina authorities, he returned "willingly" with the Pennsylvania officers to Philadelphia where he was interrogated about the tampering with the track. Within a day or two he signed a number of written statements admitting the displacement of the rail. But at the time of making his confessions he had not been told that anyone had been killed. The confessions were nevertheless admitted, and the Supreme Court of Pennsylvania, in affirming the conviction,⁹⁰ said that even if the failure of the officers to tell defendant of the seriousness of the offense "were deemed artifice, it manifestly was not designed or calculated to obtain an untrue confession. . . . The object of evidence is to get at the truth and a trick which has no tendency to produce a confession, except one in accordance with the truth, is always admissible."⁹¹

⁸⁸ *Equitable Trust Co. v. Gallagher*, 95 A.2d 470 (Del. Ch. 1953), rev'd on other grounds, 99 A.2d 490 (Del. 1953).

⁸⁹ *Id.* at 472. The court cited *Walker v. Herke*, 20 Wash.2d 239, 147 P.2d 255 (1944).

⁹⁰ *Commonwealth v. Johnson*, 372 Pa. 266, 93 A.2d 691 (1953).

⁹¹ *Id.* at 273, 93 A.2d at 694-95. This is the orthodox rule. 3 Wigmore, *Evidence* § 841 (3d ed. 1940). Of course, if the deception is such as is calculated to induce a false confession, the rule should be otherwise. In *People v. Wynekoop*, 359 Ill. 124, 194 N.E. 276 (1934), while the court held that no preliminary inquiry was necessary because the defendant's statement was not a "confession," it seems likely that the inducement which the defendant proposed to show consisted in this: that her son had made a confession, which the officers knew could not possibly be true; that they advised defendant of the son's confession but did not disclose to her that they knew it was not true. It would seem that here the deception was of a sort that might cause the mother to accuse herself falsely. For an account of the employment of an unusual "artifice" in obtaining a confession—

Confession Obtained during Illegal Detention.—Typical of the prevailing state rule which rejects the doctrine of the *McNabb* and *Upshaw* cases⁹² is the New Jersey decision in *State v. Cooper*.⁹³ The confessions were obtained some five days after the arrest of the defendants. Nevertheless, the Supreme Court of New Jersey held that illegal detention does not ipso facto require exclusion. However, following an earlier decision,⁹⁴ the court said that when there has been undue delay in taking an arrested person before a magistrate, "careful scrutiny" will be given to the conditions under which the statement was made, and it will be admitted only when it convincingly appears that it was voluntarily made.⁹⁵ Here the court was satisfied with the showing in behalf of the state.

IV

RELEVANCY

Evidence of "No Insurance."—In an action for personal injuries alleged to have been sustained while employed on defendants' farm, counsel for defendants, in his opening statement, said that "the defendants have no insurance."⁹⁶ Although the jury was immediately

one which while unquestionably offensive to the ethical sense of the community was certainly not calculated to produce a false confession—see Hilling, *The Case of Decasto Earl Mayer and Mary Ellen Smith*, 22 Wash. L. Rev. 79, 89 n.11 (1947). In this homicide prosecution, which never reached an appellate court, the state offered a confession made to a state patrolman, who had masqueraded as a Catholic priest and had thus gained the confidence of the suspect. The confession was excluded as violative of the priest-penitent privilege.

⁹² *McNabb v. United States*, 318 U.S. 332 (1943); *Upshaw v. United States*, 335 U.S. 410 (1948). See also 1949 Annual Surv. Am. L. 982; 1951 Annual Surv. Am. L. 835.

⁹³ 10 N.J. 532, 92 A.2d 786 (1952).

⁹⁴ *State v. Pierce*, 4 N.J. 252, 72 A.2d 305 (1950).

⁹⁵ "It is suggested that a more tenable solution of the Upshaw problem would be found in a rule making illegal detention strong presumptive evidence of coercion, thus putting the onus on the [prosecution] of establishing to the court's satisfaction by clear and convincing evidence that there was in fact no coercion, physical or psychological." 1949 Annual Surv. Am. L. 984-85.

⁹⁶ There appears to have been no suggestion by plaintiff, on voir dire of the jurors or otherwise, that defendants were insured. Generally, "where there is some evidence suggesting that defendant is insured, it will be proper for him to show that he is not." Note, 4 A.L.R.2d 761, 774 (1949). Thus in *Vick v. Moe*, 49 N.W.2d 463 (S.D. 1951), 5 Stan. L. Rev. 143 (1952), the court held that where plaintiff's attorney asked the prospective jurors on voir dire whether they were employees, stockholders, or agents of any liability insurance company, thus raising an inference that defendant was insured, defendant might in good faith rebut the inference. But a New York court has taken a stricter view. In *Lindboe v. Syracuse Transit Co.*, 175 Misc. 396, 23 N.Y.S.2d 667 (Sup. Ct. 1940), it was held ground for mistrial that defendants' counsel stated to the jury that defendants were not insured, notwithstanding that, in impanelling the jury, plaintiff's counsel asked a question based on § 452 of the New York Civil Practice Act making it a ground for challenge that, in actions for personal injuries or damages to property, a juror is a stockholder, officer or employee in any liability insurance company. "Neither the statute nor the question," said the court, "is predicated on the ground that the de-

instructed to disregard the statement, the Supreme Court of Washington held that "the deliberate reference to the fact that [defendants] carried no insurance . . . was improper and the prejudicial effect was not eradicated by the prompt action of the trial judge who instructed the jury to disregard it."⁹⁷ The court, in reversing a verdict and judgment for defendants (on this ground alone), rejected defendants' argument "that the statement was not prejudicial because it merely resulted in having the jury decide the case on the merits without regard to insurance," quoting with approval the response of the New Hampshire court to a similar argument:

One difficulty with this argument is that it does not appear that the jury may not have made other use of the fact. They may have thought that it would be too bad to make an uninsured man pay. The evidence is a form of the inadmissible plea of poverty.⁹⁸

This is not persuasive. Actually, it is not in the nature of a "plea of poverty"; rather it is an attempt to make clear, as the jury in any case ought to assume, that the defendant (rich or poor) is the only ultimately interested party. This is not to say that evidence of "no insurance" is relevant or material; merely that the admission of such, without more, does not on principle appear to be prejudicial.⁹⁹

V

PRIVILEGED COMMUNICATIONS

Husband and Wife.—Defendant was charged with placing an explosive in a car so as to endanger his former wife and another. Over defendant's objection, his former wife was permitted to testify "as to beatings he had inflicted upon her during their marriage," evidence deemed relevant by the court as tending to establish motive and intent. Upon appeal from a conviction, defendant contended that the evidence should have been excluded as a "privileged communication" between husband and wife. In affirming the conviction, the

defendant is or is not insured. If a juror comes within any one of the enumerated classifications, irrespective of whether the defendant is insured, a good ground of challenge is presented." *Id.* at 397, 23 N.Y.S.2d at 668. The court cited *Piechuck v. Magusiak*, 82 N.H. 429, 135 Atl. 534 (1926).

⁹⁷ *King v. Starr*, 260 P.2d 351, 355 (Wash. 1953).

⁹⁸ *Piechuck v. Magusiak*, 82 N.H. 429, 430, 135 Atl. 534 (1926).

⁹⁹ "The typical judicial approach, viz. 'if proof . . . that a defendant has insurance is improper . . . and is calculated to injure defendant, then proof that defendant has no protecting insurance is calculated for the same reason to injure plaintiff' . . . although superficially persuasive, overlooks the fact that while evidence of insurance deprives the defendant of the right to have the issue litigated on the assumption that he is the ultimately interested person, evidence of no insurance merely confirms that assumption and leaves the matter as it ought in any case be deemed to be, viz., that the defendant is actually the only interested person." 1950 Annual Surv. Am. L. 809 n.13.

Washington court held¹⁰⁰ that "the beating of one spouse by the other is not induced by confidence incident to the marriage relationship," and thus the husband's conduct was not within the protection of the privilege. Nevertheless, the court took occasion to quote approvingly from a prior decision¹⁰¹ which appears to extend the protection of the privilege to "acts" as well as "communications," if the "act is one which would not have been done by one spouse in the presence of . . . the other but for the confidence between them by reason of the marital relation. . . ."

In a recent fifth circuit case,¹⁰² defendants were charged with mail fraud, transporting stolen property in interstate commerce and conspiracy to commit these offenses. It was the Government's contention and its evidence tended to establish that defendants conspired to defraud a widow by false representations as to their financial worth and that the marriage of the victim to one of the defendants was in pursuance of the conspiracy, both defendants fraudulently representing to the victim that the defendant Pereira "was violently in love with the victim." After the indictment but before the trial the victim divorced Pereira. On appeal from a conviction, defendants contended "that the victim was not a competent witness on matters transpiring during marriage and that confidential communications between her and her husband were privileged and inadmissible." The court said that after the divorce "the wife became a competent witness generally, but her competency to testify to any communications between husband and wife which were confidential and privileged remained unaffected by the divorce."¹⁰³ Nevertheless, the court held all her testimony admissible as being within the "exception that is decisive of the question in this case."

The evidence went on to show that, insofar as the defendant Pereira was concerned, the marriage relation was merely a sham and a pretense dishonestly assumed as a means of perpetrating a fraud, and he will not be permitted to use the relation to close the lips of the victim and to shield himself from the truth.¹⁰⁴

¹⁰⁰ *State v. Americk*, 42 Wash.2d 504, 256 P.2d 278 (1953).

¹⁰¹ *State v. Robbins*, 35 Wash.2d 389, 213 P.2d 310 (1950). For a comment on the Robbins case and similar holdings in New York and Virginia, see 1949 Annual Surv. Am. L. 993-94.

¹⁰² *Pereira v. United States*, 202 F.2d 830 (5th Cir. 1953).

¹⁰³ *Id.* at 834-35.

¹⁰⁴ *Id.* at 835. The court cited, among others, the case of *United States v. Graham*, 87 F. Supp. 237 (E.D. Mich. 1949), where it was held that "in the light of reason and experience" the time had arrived to judicially enlarge the common-law exception (permitting the wife to testify where the husband is on trial for a crime of violence against her) so as to permit the wife to testify when the alleged crime is against her property. For a comment on *United States v. Graham*, supra, and other federal cases, see 1949 Annual Surv. Am. L. 995-97, esp. n.77.

So far as Pereira's codefendant was concerned, Pereira's statements to his wife were admissible as the declarations of a coconspirator.

Attorney-Client.—A New York court has held¹⁰⁵ that communications to a "patent agent," although duly registered and authorized as such to practice before the United States Patent Office, were not within the protection of the attorney-client privilege, where the "patent agent" was not admitted to practice in either the New York or federal courts. The court said that "[u]nder the New York definition of the common law rule, as re-enacted by C.P.A., Section 353, and also under the common law in other jurisdictions¹⁰⁶ where the issue has arisen, patent agents have not been accorded the attorney-client privilege."¹⁰⁷

Physician-Patient.—In a personal injury action,¹⁰⁸ defendant, conceding liability but denying that plaintiff's ailments were traceable to his negligence, called a physician who had examined plaintiff before the accident. The doctor's testimony was received over plaintiff's objection. Dissatisfied with the amount of her recovery, plaintiff contended on appeal that, although there has been no explicit statutory recognition of a physician-patient privilege in Florida, a 1951 statute¹⁰⁹ prohibiting a physician from furnishing reports of examination or treatment "to any person other than the patient, his guardian, curator, or personal representative, except upon the written authorization of the patient," operated to establish a privilege. The court thought not:

The reports, or copies of reports, mentioned in the statute do not mean answers to questions posed in a trial and ordered answered by the presiding judge. We cannot construe testimony by a witness as a report. As a consequence, we decide that there is no clean-cut language demonstrating a purpose to amend or modify the common-law rule. . . .¹¹⁰

¹⁰⁵ Kent Jewelry Corp. v. Kiefer, 202 Misc. 778, 113 N.Y.S.2d 12 (Sup. Ct. 1952).

¹⁰⁶ The court cited Brungger v. Smith, 49 Fed. 124 (C.C.D. Mass. 1892) and Judge Wyzanski's decision in United States v. United Shoe Machinery Corp., 89 F. Supp. 357 (D. Mass. 1950).

¹⁰⁷ Kent Jewelry Corp. v. Kiefer, 202 Misc. 778, 783, 113 N.Y.S.2d 12, 18 (Sup. Ct. 1952). Wigmore takes the view that in the case of one who has an official and formally supervised status as a practitioner before an administrative agency, "there is every reason . . . for recognizing a privilege . . . nor is there any apparent reason against it." 8 Wigmore, Evidence § 2300(a) (3d ed. 1940). While judicial authority is scanty, "the logic of the situation must ultimately prevail." For a criticism of Kent Jewelry Corp. v. Kiefer, supra, and a persuasive argument for Wigmore's position, see 51 Mich. L. Rev. 601 (1953).

¹⁰⁸ Morrison v. Malmquist, 62 So.2d 415 (Fla. 1953).

¹⁰⁹ Fla. Stat. Ann. § 458.16 (West 1951).

¹¹⁰ Morrison v. Malmquist, 62 So.2d 415, 416 (Fla. 1953). In a comment on Morrison v. Malmquist, supra, in 7 Miami L.Q. 580 (1953) the writer concludes: "The interpretation given the 1951 Florida statute is commendable. The value of the physician-patient privilege is, at most, doubtful. The statute itself gives no clear indication of a

VI

WITNESSES

Refreshing Memory.—In a prosecution for abortion, after a witness for the prosecution testified on cross-examination that "before she took the stand she had refreshed her memory by examining notes which she had made earlier," defendants requested that the witness be directed to produce the notes for inspection. The Supreme Court of California held¹¹¹ that the trial court properly denied defendants' request. The California statute¹¹² provides that a witness may refresh his memory by use of a writing made under certain prescribed conditions and that "in such case the writing must be produced and may be seen by the adverse party."¹¹³ But the court said that the statute applies only to the conduct of the witness while on the stand; it does not require him to produce a writing which he consulted prior to the time he testifies.¹¹⁴ While the statute does not explicitly make this distinction, it "is a codification of the common law rule," and a majority of the jurisdictions have so limited the unwritten rule.

Impeachment of One's Own Witness.—In a prosecution for burglary alleged to have been committed on the evening of March 5, the prosecution called a witness who had also been charged with the crime. He admitted he knew defendant but stated that he was with him at no time during the evening of March 5 or the morning of March 6. Claiming his privilege against self-crimination, he then refused to answer any questions pertaining to the crime. Subsequently, the defendant called the same witness and he again testified that he did not see defendant on the 5th or 6th of March. On cross-examination, the state's attorney was permitted to interrogate the witness about a prior statement which the witness had given to the prosecutor "wherein he identified [defendant] as his accomplice in

legislative intent to create such physician-patient privilege. Rather it appears designed to prevent an extra-judicial breach of the patient's confidence." *Id.* at 582. It is to be noted, however, that the statute imposes no explicit penalty for its violation. This circumstance, perhaps, lends some weight to the argument advanced by the plaintiff.

¹¹¹ *People v. Gallardo*, 257 P.2d 29 (1953), 1 U.C.L.A.L. Rev. 108.

¹¹² Cal. Code Civ. Proc. § 2047 (Deering 1953).

¹¹³ In *Eckhardt v. People*, 126 Colo. 458, 250 P.2d 1009 (1952), 25 Rocky Mt. L. Rev. 388 (1953), it was held reversible error to refuse defendant's request to examine notes used by a state's witness, while testifying, to refresh his memory. But it is the opponent only who may put the memorandum before the jury. "It is indeed true that, if a witness says that anything in fact refreshes his memory he may use it, however irrelevant it may be in fact. But if it is a document, it does not itself go before the jury, unless the other side puts it in." Judge Learned Hand, in *Portman v. American Home Products Corp.*, 201 F.2d 847, 850 (2d Cir. 1953).

¹¹⁴ Wigmore's view is that the right of inspection should also obtain in respect to a memorandum consulted before trial. "[T]he risk of imposition and the need of safeguard is just as great." 3 Wigmore, *Evidence* § 762 (3d ed. 1940).

the commission of the crime." The Supreme Court of Illinois held the cross-examination proper.¹¹⁵ Modifying, if not overruling, a prior decision,¹¹⁶ the court said that whereas "it may well be true" that a party may not impeach a witness, called by him and later by his adversary, by attempting to "demonstrate that the witness is generally unworthy of belief," the rule should never preclude the proof of a prior declaration inconsistent with his testimony.¹¹⁷

Impeachment: Statutory Exclusion of Written Statements in Personal Injury and Wrongful Death Actions.—A Virginia statute¹¹⁸ provides that in an action to recover for personal injury or death by wrongful act, "no . . . statement in writing other than a deposition, after due notice, of a witness as to the facts or circumstances attending the wrongful act or neglect complained of, shall be used to contradict him as a witness in the case." In a secondary action against the insurer of the employer of the negligent truck driver to recover an unsatisfied judgment in the original action, plaintiff called the truck driver who testified he had been instructed not to carry riders; defendant, to impeach his testimony, offered a written statement which the witness had made after the accident. The Supreme Court of Virginia held that the exclusion of the statement was error.¹¹⁹ The statement, said the court, was not within the scope of the statute, first, because the statute refers only to tort actions, and not to a contract action based on an insurance policy; and, second, because the statement did not relate to "the facts or circumstances attending the wrongful act or neglect," but to "facts or circumstances attending a conference prior to the accident," at which the instructions had been given.

VII

OPINION RULE

Identity and Speed of Automobile.—Plaintiff, a ten-year-old boy, struck by an automobile while crossing a highway at night, was unable to identify the kind of car which struck him. He produced as witnesses two twelve-year-old companions. One of these witnesses,

¹¹⁵ *People v. Van Dyke*, 414 Ill. 251, 111 N.E.2d 165 (1953), [1953] U. of Ill. L. Forum 296.

¹¹⁶ *People v. Johnson*, 314 Ill. 486, 145 N.E. 703 (1924).

¹¹⁷ The court cited an early Colorado case, *Jones v. People*, 2 Colo. 351 (1874), wherein the court said: "In our view the rule under consideration precludes a party from attacking the general character of a witness called by him, but does not preclude him from proving statements of the same witness inconsistent with his testimony on the stand, delivered at the instance of the opposite party." *Id.* at 357-58. Wigmore is in accord. 3 Wigmore, Evidence § 902 (3d ed. 1940).

¹¹⁸ Va. Code Ann. § 8-293 (1950).

¹¹⁹ *Liberty Mut. Ins. Co. v. Venable*, 194 Va. 357, 73 S.E.2d 366 (1952), criticized in 1 Wm. & Mary Rev. of Va. L. 186 (1953).

shown a photograph of defendant's car, was asked whether it was the car. Objection was sustained on the ground that the age of the boy disqualified him from giving such testimony. Also, he was not permitted to testify as to the speed of the car. The other boy testified that he had a "good look at the grille, body and back of the car," and that it was a "thirty-six Ford." But an objection to this was also sustained. These rulings were erroneous, held the New York Court of Appeals.¹²⁰

Automobiles are so numerous, so many people have large experience with them, and so many (especially, it may be said, growing boys) interest themselves in the special characteristics of various models of cars, that it is unreal to say that only a particularly qualified expert can distinguish a "1936 Ford."¹²¹

Grief of Another.—Defendant was charged with the homicide of his wife. Admitting he shot her, he claimed it was accidental. The prosecution called two officers who saw defendant at the funeral home on the afternoon of the killing and they were permitted to testify, over objection, that at that time defendant showed no signs of grief; he had "a normal expression on his face." Error, said the Supreme Court of Mississippi.¹²² While "the demeanor, acts and conduct of an accused, at the time and subsequent to the crime are admissible . . . this should be limited to a statement of the facts by the witness or witnesses, leaving the jury free to form its own conclusions."¹²³

Witness' "Understanding" of What a Party Said.—In a civil action, plaintiff's witness was permitted to testify that he "understood" defendant to say so and so. The testimony was admissible, said the Texas court.¹²⁴

We have given careful attention to the testimony and believe that a reasonable interpretation of his testimony shows that he was testifying to what he understood appellant to say and not to what he understood she meant. The fact that a witness uses the expression "understood" does not render his testimony inadmissible, when the term is used in the sense of explaining what he heard the witness say.¹²⁵

Expert Opinion Based on Extrajudicial Statements.—In a homicide prosecution, where the defense was insanity, the accused called a psychiatrist who proposed to give an opinion as to the sanity of the accused based not only on his examination of the accused and

¹²⁰ *Senecal v. Drollette*, 304 N.Y. 446, 108 N.E.2d 602 (1952).

¹²¹ *Id.* at 449, 108 N.E.2d at 603.

¹²² *Harrelson v. State*, 65 So.2d 237 (Miss. 1953).

¹²³ *Id.* at 239. For a persuasive exposition of a contrary and, it would seem, a sounder view, see *State v. George*, 58 Wash. 681, 109 Pac. 114 (1910).

¹²⁴ *Wood v. Wood*, 253 S.W.2d 90 (Tex. Civ. App. 1952).

¹²⁵ *Id.* at 91.

statements made to him by the accused but as well on statements made to the doctor by members of the family of the accused. The Supreme Court of Pennsylvania sustained the ruling of the trial court directing the psychiatrist to exclude the statements of the family in forming his opinion.¹²⁶

Qualifications of Expert.—On an appeal from a decree sustaining a will against a claim of testamentary incompetency, the sole question was as to the admissibility of the testimony of an "eye, ear, nose and throat specialist," based upon a thirty-minute consultation (four days after the will was executed) when the deceased came to his office for an examination for his civil aeronautics license and to get some glasses, that the deceased was "absolutely sane, just as sane as I am." Under the California statute¹²⁷ limiting lay testimony as to sanity to that of "intimate acquaintances," it was necessary that the doctor's testimony qualify "as that of an expert." In holding that it did, the California court said that "such a person, particularly in view of the years of hospital and private practice experience this doctor had, is qualified to observe a person and form and give an opinion concerning that person's sanity. He need not specialize in psychiatry to do so."¹²⁸

VIII

MISCELLANEOUS: CRIMINAL EVIDENCE

The United States Supreme Court, in *Schwartz v. Texas*,¹²⁹ resolved a question which has remained unanswered since the first *Nardone* case:¹³⁰ does Section 605 of the Federal Communications Act¹³¹ operate to bar evidence of intercepted telephone conversations in a state criminal proceeding? The Court held not. While inadmissible in the federal courts, "it does not follow that such evidence

¹²⁶ Commonwealth v. Patskin, 372 Pa. 402, 93 A.2d 704 (1953).

¹²⁷ Cal. Code Civ. Proc. § 1870 (10) (Deering 1953).

¹²⁸ In re Gore's Estate, 260 P.2d 859, 861 (Cal. 1953). The doctor's education and experience: "He took his medical training at the University of Vienna, graduating with the degree of medicine in 1937; came to this country in June, 1938, and took medical work here; was in Chicago for a short time; came to San Francisco and interned at the city and county hospital during 1938 and 1939; was with Green's Eye Hospital, San Francisco, for about three years; then practiced in Richmond, California, for a while, doing eye, ear, nose and throat at the shipyard; since then he has been practicing in Pittsburg [California]; limits his practice to eye, ear, nose and throat almost exclusively." Id. at 861.

¹²⁹ 344 U.S. 199 (1952), noted in 2 J. Pub. L. 199 (1953), 18 Mo. L. Rev. 185 (1953). The decision of the Texas court in *Schwartz v. Texas*, 245 S.W.2d 174 (Tex. Crim. App. 1952), is noted in 6 Southwestern L.J. 308, 31 Texas L. Rev. 70. See also Notes, Wire Tapping in Missouri, [1953] Wash. U.L.Q. 340; Exclusion of Evidence Obtained by Wire Tapping: An Illusory Safeguard, 61 Yale L.J. 1221 (1952).

¹³⁰ *Nardone v. United States*, 302 U.S. 379 (1937).

¹³¹ 48 Stat. 1103 (1934), 47 U.S.C. § 605 (1946).

is inadmissible in a state court." After calling attention to the rule of the *Wolf* case¹⁸² to the effect that there is no federal prohibition of the use in state criminal actions of evidence obtained as the result of an illegal search, notwithstanding the contrary federal rule, the court said that the problem under Section 605 is "somewhat different because the introduction of the intercepted communications would itself be a violation of the statute, but in the absence of an expression by Congress this is simply an additional factor for a state to consider in formulating a rule of evidence for its own courts."¹⁸³

In a New York perjury prosecution,¹⁸⁴ when the recordings of certain intercepted telephone conversations were played back for the benefit of the jury, there was furnished to each juror a mimeographed transcript of the recorded conversations. The transcripts had been made by an official stenographer who testified that they had been made from the original recordings and were accurate "word for word." Before being admitted in evidence, the transcripts were compared by the court and counsel out of the presence of the jury. The Court of Appeals of New York held "there was nothing" to the defendant's objection to the receipt of the transcripts in evidence on the ground that "the subject matter was secondary evidence, repetitious and prejudicial." The court said that

the recordings were the best evidence of the conversations,¹⁸⁵ the transcript added nothing. To allow the court and jurors to hold in their hands a transcript as they listened to the playback of the records was no different than allowing them to have, in an appropriate case, a photograph, a drawing, a map or a mechanical model, any of which have long been recognized as an assistance to understanding.¹⁸⁶

¹⁸² *Wolf v. Colorado*, 338 U.S. 25 (1949).

¹⁸³ *Schwartz v. Texas*, 344 U.S. 199, 201 (1952). The court also noted that "this question has been many times before the state courts, and they have uniformly held that § 605 does not apply to exclude such communications from evidence in state courts. [Citing cases from Maryland, New York and California.] While these cases are not controlling here, they are entitled to consideration because of the high standing of the courts from which they come." *Id.* at 202.

¹⁸⁴ *People v. Feld*, 305 N.Y. 322, 113 N.E.2d 440 (1953).

¹⁸⁵ See *Meyers v. United States*, 171 F.2d 800 (D.C. Cir. 1948), cert. denied, 336 U.S. 912 (1949), 1950 Annual Surv. Am. L. 828.

¹⁸⁶ *People v. Feld*, 305 N.Y. 322, 331-32, 113 N.E.2d 440, 444 (1953). In *People v. Stephens*, 117 Cal. App.2d 653, 256 P.2d 1033 (1953), the California court reversed a judgment of conviction in a forgery prosecution upon the ground, among others, that recordings of tape and wire recordings of conversations with defendant, played back at the trial, were not "audible and intelligible." In such case, "the witness who heard the conversations should be called to testify." The District Attorney had furnished the trial judge, and had available for his own use, "copies" of the transcriptions (not offered in evidence), the preparation of which, the District Attorney said, had "required hours and hours of checking, and very careful electronic work by the District Attorney's experts and the police." He declined to furnish a copy to defendant's counsel.

IX

THE UNIFORM RULES OF EVIDENCE

At its annual conference in Boston in August, 1953, the National Conference of Commissioners on Uniform State Laws approved the Uniform Rules of Evidence,¹³⁷ the drafting of which was begun in 1949 by a Committee of the Conference of which Judge Spencer A. Gard of Iola, Kansas, was chairman.¹³⁸ In 1948, the Conference determined that the law of evidence was a proper field for uniform legislation. In 1949, the American Law Institute referred its Model Code of Evidence to the Conference for study, and, if deemed desirable, for redrafting. While "the first approach was that the project should be jointly carried on with the Institute and should have for its objective the review and revision of the Model Code of Evidence,"¹³⁹ it was subsequently determined that the project should go ahead as an independent undertaking of the Conference, pursuant to the invitation of the American Law Institute to use its Model Code of Evidence "as the basis for the preparation of a Uniform Code of Evidence." It is stated in the Prefatory Note that

the Conference has recognized its obligation to use The American Law Institute's Model Code of Evidence as a basis from which to work, and has proceeded accordingly. That thorough, candid work by the nation's best talent commands respect. But if its departures from traditional and generally prevailing common law and statutory rules of evidence are too far-reaching and drastic for present day acceptance, they should be modified in such respects as will express a common ground of acceptability in the jurisdictions and by the tribunals which the rules are expected to serve. So with the objects of acceptability and uniformity in mind, this effort is devoted to the policy of retaining such parts of the Model Code as appear to meet the requirements of such objectives, and to reject, revise or modify the rest.¹⁴⁰

In 1952, the Conference was advised by the Director of the American Law Institute that "the Institute desired to appoint a committee of its own membership to advise with the Committee of the Conference and to consider its work, to the end that when the project is completed, the Uniform Rules of Evidence may have the

¹³⁷ Copies of the Uniform Rules, with the Committee's comments, may be obtained from the National Conference of Commissioners on Uniform State Laws, 1419 First National Bank Building, Omaha 2, Nebraska.

¹³⁸ Other members of the Committee: Mason Ladd, University of Iowa Law School, Iowa City, Iowa; Charles T. McCormick, University of Texas Law School, Austin, Texas; Lucian E. Morehead, Slaton Building, Plainview, Texas; Maynard E. Pirsig, University of Minnesota Law School, Minneapolis, Minnesota; John Carlisle Pryor, Tama Building, Burlington, Iowa; Robert E. Woodside, Attorney General, Harrisburg, Pennsylvania; Joe E. Estes, Republic Bank Building, Dallas, Texas.

¹³⁹ Uniform Rules of Evidence 3 (1953).

¹⁴⁰ *Ibid.*

approval of the Institute." This offer was approved by the Conference and a committee of the Institute was appointed¹⁴¹ which "made comments, criticisms and suggestions [to the Conference Committee], and many of their suggestions have been adopted and are reflected in [the Uniform] rules."¹⁴² The objectives of the Conference Committee have been stated by Judge Gard as follows:

The broad aims of the Uniform Rules of Evidence are the same as those behind the Model Code of Evidence, namely (a) to rationalize the law of evidence, and (b) to express it in convenient, usable form. To these broad aims there may be added in the case of the Uniform Rules, the aim of uniformity as a desirable objective, which may, or should give some impetus to acceptance. Also there are the narrower and more immediate aims which are (a) to capitalize on the prestige of the Model Code of Evidence as a masterpiece of craftsmanship and coverage, (b) to give it more of the slant of the practicing lawyer and the judge on the bench and less of academic emphasis, (c) to avoid or materially reduce burdensome cross references, (d) to achieve further simplicity of expression, and (e) most important of all, to overcome the rather strenuous opposition in many quarters to the Model Code's liberality, by the simple expediency of being less liberal.¹⁴³

While the following summary is not by any means exhaustive, it does include reference to what appear to be the more significant variations between the Model Code and the Uniform Rules.

Presumptions.—As to the force and effect of a presumption of law, the Uniform Rules provide (Rule 14) that "if the facts from which the presumption is derived have any probative value as evidence of the existence of the presumed fact," the presumption operates to shift the burden of persuasion;¹⁴⁴ if, on the other hand, "the facts

¹⁴¹ Consisting of: Professor E. M. Morgan, Chairman, School of Law, Vanderbilt University; Professor Judson F. Falknor, University of California Law School; Honorable Learned Hand, Second Circuit, United States Court of Appeals; Professor James R. McElroy, University of Alabama School of Law; and Professor John M. Maguire, Harvard Law School.

¹⁴² Prefatory Note, Uniform Rules of Evidence 4 (1953). "Except for some minor variations in order of arrangement, the outline is very much the same as the arrangement in The American Law Institute's Model Code of Evidence. Also, the general policy of the draftsmen for the Model Code in covering the matter in the form of rather broad general rules has been adopted, in preference to a policy of voluminous detail. One substantial variation from the Model Code approach lies in the omission from the present draft of procedural rules which are thought to be either unnecessary or not within the scope of the general scheme to deal primarily with problems of admissibility of evidence. Examples of this are the omission of rules relating to the saving of exceptions [Model Code Rule 5], comment on the evidence by the judge [Model Code Rule 8] and control of the judge over trial procedure [Model Code Rule 105]." Ibid.

¹⁴³ Address of Judge Gard before Evidence Roundtable of Association of American Law Schools at Chicago, Illinois, on December 28, 1953.

¹⁴⁴ "It was long thought that in Pennsylvania the establishment of the basic fact of a presumption fixed upon the opponent not only the risk of non-production of

from which the presumption arises" have no such probative value, then the presumption disappears as a matter of law in the face of evidence "which would support a finding of the non-existence of the presumed fact." This, it will be recalled, was the solution proposed by Professor Morgan as reporter for the Model Code of Evidence but which was rejected by the Institute at its meeting in May, 1941, the Institute at that time, by a vote of fifty-nine to forty-two, directing the substitution of the "Thayerian" rule.¹⁴⁵ In pursuance of this

evidence sufficient to justify a finding of the non-existence of the presumed fact but also the burden of persuasion. To what extent this view still prevails in Pennsylvania is doubtful." Morgan & Maguire, *Cases and Materials on Evidence* 113 (3d ed. 1951). For an analysis of the Pennsylvania cases, see Note, *The Effect of Rebuttable Presumptions in Pennsylvania*, 57 Dick. L. Rev. 234 (1953).

¹⁴⁵ 18 Proceedings A.L.I. 226 (1941). The motion of substitution was made by Judge Augustus Hand who said, in support of his motion: "I have been converted, reconverted, unconverted, deceived, disillusioned and had all sorts of things done to me in this field. I must say that I have a strong feeling that has been growing on me that a distinction was being made here that was pretty unreliable for the trial judge. I want to have heard, as I think you all will, Judge Lummus on this subject. I think if you depart from the Thayerian doctrine and have the trial judge try to distinguish between a presumption that has an inferential basis in fact, a logical basis, and another kind of a presumption you are going to get into a field of a great deal of confusion and I really believe, as I feel now—I may change in five minutes—in this confusing subject, but I believe in adhering to the Thayerian doctrine which is that as soon as evidence is introduced against the presumption, whether it be one founded on a logical inference or not, that the presumption disappears from the case and the question is then left for the jury, if there are any facts for the jury as the evidence warrants. I believe that is really the way the case comes up in nine cases out of ten and this thing is too complicated for me. The Supreme Court of the United States some years ago came out for the strict Thayerian rule and I think it is pretty well understood by the [members of the] profession that have studied the matter at all and tried to apply it." *Id.* at 208-09. Judge Lummus' comment on the same occasion: "[U]nder the Thayerian doctrine there still remains whatever force the fact which gives rise to the presumption has as a matter of logical inference. Under this rule, if there is no logical force to the fact that gives rise to the presumption, the presumption does not have the effect of changing the burden of proof. There, there is no substantial difference in the Thayerian rule and this rule. But what happens under the Thayerian rule is that in all cases the burden of proof in the sense of the burden of persuasion remains on the same party with which it started. That has been the law of many, if not most states, by judicial decision. The only state according to the Reporter that has followed the rule the Reporter has laid down is Pennsylvania. The adoption of the Reporter's rule would change the law of a multitude of states, and would make the law of any state that adopts it conform to the Pennsylvania doctrine. I agree that this Pennsylvania doctrine interpreted by the Reporter in his rule is workable. I don't think there is any greater difficulty in applying it than there is in applying the Thayerian rule; but the Thayerian rule is equally workable and equally simple. The judge never ought to use the word 'presumption' to the jury under either rule. But just what advantage has this rule of the Reporter over the Thayerian rule that would lead the whole country to overrule all its former decisions and adopt a rule that so far as I know prevails only in one state? The Supreme Court of the United States in some decisions within the last few years has adopted the Thayerian rule in toto. . . ." *Id.* at 211-12. But the present Conference Committee was not persuaded: "The Thayer view has been approved in a substantial number, perhaps a majority, of recent decisions which have considered the question. . . . On the other hand, there is a strong argument for the

determination, there was formulated Rule 704 of the Model Code which provides, in effect, that *all* presumptions of law disappear as a matter of law in the face of opposing evidence sufficient to justify a finding of the nonexistence of the presumed fact.¹⁴⁶

Inconsistent Presumptions.—The Model Code, Rule 704, provides, in effect, that inconsistent presumptions cancel each other as a matter of law. But under the Uniform Rules (Rule 15) in the case of conflicting presumptions, the judge is to apply "the presumption which is founded on weightier considerations of policy and logic," although it is additionally provided that if there is no such preponderance, they shall cancel each other.¹⁴⁷

Impeachment.—Like the Model Code (Rule 106) the Uniform Rules (Rules 20-22 inclusive) remove all restrictions on impeaching one's own witness, make inadmissible evidence of the conviction of a crime to impeach an accused-witness "unless he has first introduced evidence admissible solely for the purpose of supporting his credibility,"¹⁴⁸ put the "foundation" necessary for the proof by extrinsic

view that the jury needs guidance in this situation if they are to give due effect to the probabilities and frequently the substantive policy on which the presumption is based. Before the Thayer discovery came into vogue, the practice of instructing on the effect of presumptions was the established tradition. Wigmore, who accepted and popularized the Thayer view, nevertheless acknowledged in the last edition of his treatise, the need for advising the jury that they could give special weight to the course of experience as embodied in the presumption. 9 Wigmore, Ev. 2498a, pp. 340, 341, Par. 21, 22 (3rd ed., 1940). . . . If the jury are to be advised, by what kind of instruction? . . . [W]e find the courts reverting from time to time to the ancient, common-sense practice of charging the jury as to certain presumptions having a substantial backing of probability, that the presumption stands until overcome in the jury's mind by a preponderance of evidence to the contrary. In other words, the presumption is a 'working' hypothesis which works by shifting the burden to the party against whom it operates of satisfying the jury that the presumed inference is untrue. This often gives a more satisfactory apportionment of the burden of persuasion on a particular issue than can be given by the general rule that the pleader has the burden. One looks rather to the ultimate goal, the case or defense as a whole, the other to a particular fact-problem within the case. Moreover, an instruction that the presumption stands until the jury are persuaded to the contrary, has the advantage that it seems to make sense and will be more readily understood by the jury than the other types of instructions on presumptions." Uniform Rules of Evidence 14 (1953).

¹⁴⁶ See Laughlin, In Support of the Thayer Theory of Presumptions, 52 Mich. L. Rev. 195 (1953).

¹⁴⁷ The Conference Committee's comment: "The courts adopting the Thayer theory of presumptions insist that conflicting presumptions cancel each other. But in view of Rule 14, which does not follow the Thayer doctrine, a different solution for conflicting presumptions must be found. The best and simplest solution, and that most consistent with good sense is to leave it to the judge to determine, with what help he can get from case precedents, whether either presumption has the preponderance of public policy in its favor, and if so, to instruct the jury accordingly." Uniform Rules of Evidence 15 (1953).

¹⁴⁸ The English and Pennsylvania statutes are substantially to the same effect. The Criminal Evidence Act, 1898, 61 & 62 Vict. c. 36 § 1(f); Pa. Stat. Ann. tit. 19, § 711

evidence of a prior inconsistent statement on a discretionary basis, make inadmissible evidence of traits of the witness' character other than "honesty or veracity or their opposites," and abrogate the orthodox rule forbidding evidence to support a witness' character unless it has first been attacked. The principal points of variation are these: Whereas the Model Code would completely abrogate the rule of the *Queen's* case, the Uniform Rules, adopting the middle-ground solution suggested by Judge Learned Hand's opinion in *United States v. Dilliard*,¹⁴⁰ provide that while "it shall not be necessary to show or read to [the witness] any part of the writing," nevertheless "if the judge deems it feasible, the time and place of the writing and the name of the person addressed, if any, shall be indicated to the witness." Whereas the Model Code in terms makes inadmissible merely "extrinsic evidence" of a conviction of crime "not involving dishonesty or false statement," the Uniform Rules (Rule 21) make all such evidence inadmissible, whether "extrinsic" or developed on cross-examination.¹⁰⁰ Also, whereas the Model Code forbids merely "extrinsic evidence" of specific instances of conduct "relevant only as tending to prove a trait of [the witness'] character," the Uniform Rules (Rule 22) forbid any evidence of specific instances of prior misconduct. The present majority rule permits, within limits, cross-examination as to prior instances of misconduct although there are some jurisdictions¹⁵¹ which forbid it entirely.

Lawyer-Client Privilege.—Rule 210 of the Model Code limits the application of the privilege to cases where the witness is either the client or the lawyer or the representative of one or the other.

(Purdon 1936). Like Model Code of Evidence, Rule 201 (1942), the Uniform Rules of Evidence, Rule 23(4), provide that if an accused in a criminal action does not testify, counsel may comment upon his failure to testify and the trier of the fact may draw all reasonable inferences therefrom. A prohibition against impeachment of an accused-witness by evidence of convictions of crime certainly puts the right of comment upon a considerably fairer basis. There seems to be general agreement among those with experience in the trial of criminal cases that not infrequently the failure of the accused to testify is explainable not because of a consciousness of guilt or of a fear that his testimony will disclose guilt, but rather because of his realization that if he does testify his prior criminal record will be paraded before the jury, ostensibly for the purpose of affecting his credibility, but actually with far more disastrous, though theoretically improper, results.

¹⁴⁰ 101 F.2d 829 (2d Cir. 1938).

¹⁵⁰ I have never been able to understand the limitation of the restriction upon impeachment (in Rule 106 of the Model Code) to "extrinsic evidence" of a conviction of crime. Every argument in support of such a restriction upon the use of "extrinsic evidence" would seem equally applicable to cross-examination. It seems possible that the failure of the Model Code to limit cross-examination in this respect was inadvertent. In any case, the provision of the Uniform Rules extending the restriction to cross-examination is clearly an improvement.

¹⁵¹ See, e.g., Cal. Code Civ. Proc. § 2051 (Deering 1953); *People v. Harlan*, 133 Cal. 16, 65 Pac. 9 (1901); *Warren v. Hynes*, 4 Wash.2d 128, 102 P.2d 691 (1940).

Thus, it seems clear that under the Model Code the privilege would not operate to prevent the testimony of an eavesdropper or probably of one who surreptitiously intercepts a communication between lawyer and client.¹⁵² The Uniform Rules (Rule 26), however, take a different view and in unmistakable language bring within the sweep of the privilege the testimony of *any* witness disclosing a communication between client and lawyer if it came to the knowledge of the witness either "in the course of its transmittal between the client and the lawyer" or "in a manner not reasonably to be anticipated by the client."¹⁵³

Husband-Wife Privilege.—The practically universal American view is that termination of the marital relation does not terminate the privilege protecting confidential communications during the existence of the relation.

The privilege is intended to secure such a guarantee against apprehension or disclosure as will induce absolute freedom of communication; and this can be attained only by continuing the protection in spite of the termination of the marital relation. . . . Hence it has always been conceded that the death of the person communicating does not terminate the privilege. . . . In the same way, the privilege does not terminate with divorce.¹⁵⁴

Such clearly is the rule of the Model Code (Rule 215). But the Uniform Rules (Rule 28) provide otherwise. The privilege exists only "during the marital relationship."¹⁵⁵

Comment upon Claim of Privilege.—The Model Code (Rule 233) permits comment upon a claim of privilege and allows the trier of the fact to draw all reasonable inferences therefrom. The Uniform Rules (Rule 39), on the other hand, forbid comment upon the claim of any privilege with the single exception (Rule 23[4]) that if an

¹⁵² Wigmore is in accord: "The law provides subjective freedom for the client by assuring him of exemption from its processes of disclosure against himself or the attorney or their agents of communication. This much, but not a whit more, is necessary for the maintenance of the privilege. Since the means of preserving secrecy of communication are entirely in the client's hands, and since the privilege is a derogation from the general testimonial duty and should be strictly construed, it would be improper to extend its prohibition to third persons who obtain knowledge of the communications. One who overhears the communication, whether with or without the client's knowledge, is not within the protection of the privilege. The same rule ought to apply to one who surreptitiously reads or obtains possession of a document in original or copy." 8 Wigmore, Evidence § 2326 (3d ed. 1940).

¹⁵³ However, Uniform Rules of Evidence, Rule 28 (1953) appears to be intended to preserve the prevailing rule that an eavesdropper may testify to confidential communications between husband and wife. See 8 Wigmore, Evidence § 2339 (3d ed. 1940).

¹⁵⁴ 8 id. § 2341.

¹⁵⁵ A fairly recent English case, *Shenton v. Tyler*, [1939] Ch. 620, construing the Evidence Amendment Act of 1853, 16 & 17 Vict., c. 83, appears to support the Uniform Rules' provision.

accused in a criminal action does not testify, counsel may comment thereupon and the trier of the fact may draw all reasonable inferences therefrom.

Opinion Rule.—While it is the view of the Conference Committee that the Uniform Rules do “not open the door quite so wide for testimony in the form of opinion as does the Model Code” (Rule 401), it is to be noted that Rule 56 does permit a percipient lay witness to testify in terms of “rational” opinions or inferences if such “are helpful to a clear understanding of his testimony or to the determination of the fact in issue.” While it is true that the Model Code rule does, in effect, reverse the present normal routine by permitting a lay witness to testify in terms of inference and opinion *unless* the judge finds that he can adequately reproduce his factual knowledge to the jury, it is to be noted that the Model Code does make the ultimate question turn on the judicially accepted criterion, namely, the witness’ ability to reproduce, in words, the basic factual data within his knowledge. The Uniform Rules, on the other hand, make no reference to this principle which is explanatory of most cases admitting lay opinion.

Character Evidence.—Like the Model Code (Rule 306), the Uniform Rules (Rule 47) would permit proof of character (not in issue but relevant as tending to prove conduct on a specified occasion) not only by reputation evidence but as well by the personal opinion of the character witness. This represents a distinct change in existing law. The Uniform rule also, as does the Model Code rule, permits proof of such character by “evidence of conviction of a crime which tends to prove the trait to be bad.” And, following the Model Code rule, the Uniform rule, while forbidding evidence of defendant’s bad character in a criminal prosecution unless the accused has introduced evidence of good character, permits the prosecution in rebuttal, after evidence of good character, to show a prior conviction of a crime which tends to prove the trait of character to be bad. Thus under both the Model Code and the Uniform Rules if a defendant charged with burglary calls character witnesses, the prosecution in rebuttal may show prior burglary convictions as tending to show a burglarious propensity as making guilt more likely.¹⁵⁶

Hearsay.—The Model Code (Rule 503) proposes a radical relaxation of the hearsay rule: A hearsay declaration is to be admissible if either (a) the declarant is unavailable as a witness, or (b) is present and subject to cross-examination. The Uniform Rules (Rule 63[1])

¹⁵⁶ The New York Statute is to the same effect: “When the defendant offers evidence of his character, the prosecution may offer in rebuttal thereof proof of his previous conviction of a crime.” N.Y. Code Crim. Proc. § 393-c.

adopt (b) but not (a); in other words, under the Uniform Rules a prior inconsistent statement or a prior consistent statement¹⁵⁷ of a witness would be admitted substantively,¹⁵⁸ but mere unavailability would not be ground for the admissibility of hearsay. However, the Uniform Rules (Rule 63[4][c]) do adopt an expanded version of the Massachusetts hearsay statute,¹⁵⁹ namely, that "if the declarant is unavailable as a witness, a statement narrating, describing or explaining an event or condition which the judge finds was made by the declarant at a time when the matter had been recently perceived by him and while his recollection was clear, and was made in good faith prior to the commencement of the action" is admissible.¹⁶⁰ It is to be noted that whereas the Massachusetts statute limits admissibility to cases where the witness is unavailable because of death, the Uniform Rules expand the exception to include situations where the witness is unavailable for any reason.¹⁶¹

¹⁵⁷ This provision is, of course, to be read with Uniform Rules of Evidence, Rule 45, which like Rule 303 of the Model Code accords to the trial judge, generally, discretion to exclude evidence "if he finds that its probative value is substantially outweighed by the risk that its admission will (a) necessitate undue consumption of time, or (b) create substantial danger of undue prejudice or of confusing the issues or of misleading the jury, or (c) unfairly and harmfully surprise a party who has not had reasonable opportunity to anticipate that such evidence would be offered." At least where there has been no substantial impairment of the witness, his prior consistent statements will add very little, if anything, to his in-court testimony; it is to be expected, consequently, that in the ordinary case the trial judge is very likely to hold that the very slight increment of probative value arising from prior consistent statements would be more than outweighed by the exclusionary factors mentioned in Rule 45.

¹⁵⁸ This is in accord with Wigmore's view: "the theory of the Hearsay rule is that an extrajudicial statement is rejected because it was made out of Court by an absent person not subject to cross-examination. Here, however, by hypothesis the witness is present and subject to cross-examination. There is ample opportunity to test him as to the basis for his former statement. The whole purpose of the Hearsay rule has been already satisfied. Hence there is nothing to prevent the tribunal from giving such testimonial credit to the extrajudicial statement as it may seem to deserve. Psychologically of course, the one statement is as useful to consider as the other; and everyday experience outside of court-rooms is in accord. The contrary view, however, is the orthodox one." 3 Wigmore, Evidence § 1018 (3d ed. 1940). See also McCormick, *The Turncoat Witness: Previous Statements as Substantive Evidence*, 25 Texas L. Rev. 573 (1947).

¹⁵⁹ Mass. Ann. Laws c. 233, § 65 (Michie Supp. 1953).

¹⁶⁰ It is to be noted that under Rule 503(a) of the Model Code, the only preliminary finding necessary is that the declarant "is unavailable as a witness." But under Rule 63(4)(c) of the Uniform Rules, it must be found by the judge preliminarily that (a) the declarant made the statement; (b) he made it at a time "when the matter had been recently perceived by him and while his recollection was clear"; (c) he made it in good faith; and (d) he made the statement prior to the commencement of the action. See *Slotofski v. Boston Elevated Ry.*, 215 Mass. 318, 102 N.E. 417 (1913). In this connection, it is to be noted that the Uniform Rules (Rule 1[8]) like the Model Code (Rule 1[5]) provide that "a ruling implies a supporting finding of fact; no separate or formal finding is required unless required by a statute of this state."

¹⁶¹ The Uniform Rules (Rule 62[7]) define "unavailability" in approximately the same broad terms as the Model Code (Rule 1[15]).

Exceptions to the Hearsay Rule: (a) Record of Past Recollection.

—The Uniform Rules contain no specific provision touching the admissibility of the record of a past recollection. So far as the present orthodox rule is concerned, Rule 63(1) (making admissible the prior hearsay of one now in court and subject to cross-examination) seems to cover the situation adequately. However, the Model Code (Rule 504[b][ii]) appears to modify present doctrine by providing for the admissibility of a written statement although not made by the witness and although he never inspected it, if the judge finds that "the witness stated [to the recorder] what he perceived and the written statement, by whomever or however made, correctly sets forth what the witness stated." Rule 504(b)(ii) of the Model Code has no counterpart in the Uniform Rules.

(b) *Former Testimony.*—The Model Code (Rule 511) would admit former testimony (given in any former action or proceeding) "for any purpose for which the testimony was admissible in the action in which the testimony was given." Thus, the Model Code would eliminate, as such, present requirements of identity of issue and identity of parties. While the Uniform Rules (Rule 63[3]) would unquestionably work a substantial change in existing doctrine, they evidently do not go quite as far as the Model Code. In substance, it is provided in the Uniform Rules that former testimony (given in any former action or proceeding) is admissible when (a) it is offered against a party who offered it in his own behalf on the former occasion, or (b) "the issue is such that the adverse party on the former occasion had the right and opportunity for cross-examination with an interest and motive similar to that which the adverse party has in the action in which the testimony is offered." In substance, this is the rule Wigmore advocated.¹⁶² It is to be noted that the Uniform Rules would overturn the prevailing view that *at least* there must be an identity of opponents and, of course, would abrogate what is probably the orthodox rule that there must be an identity of parties on both sides, proponent as well as opponent (the so-called "mutuality" or "reciprocity" principle).

(c) *Dying Declarations.*—Because the Model Code (Rule 503[a]) makes unavailability alone the basis for the admissibility of hearsay, there was no occasion to deal with dying declarations and accordingly the Model Code includes no rule specifically touching this type of hearsay. However, because the Uniform Rules do not recognize unavailability alone as a ground of admissibility, particular treatment of dying declarations was necessary. The rule adopted (Rule 63[5])

¹⁶² 5 Wigmore, Evidence § 1388 (3d ed. 1940).

greatly expands the exception as recognized by most cases. By the Uniform rule a statement made by a deceased person is admissible in any action or proceeding "if the judge finds that it was made voluntarily and in good faith and while the declarant was conscious of his impending death and believed that there was no hope of his recovery." It is clear that this rule would change orthodox doctrine in several respects. Under the prevailing view dying declarations are admissible only in a criminal prosecution for the homicide of the declarant; admissibility is limited to that part of the declaration which concerns the "res gestae" of the killing; moreover, most courts are disposed to apply, rather strictly, the opinion rule to a dying declaration.

(d) *Confessions*.—The Model Code (Rule 505) requires a preliminary finding that an offered confession was not induced by the "infliction of physical suffering upon [the accused] or threats thereof." The Uniform Rules (Rule 63[6]) require a preliminary finding that the accused was not induced to make the statement "under compulsion or by infliction or threats of infliction of suffering upon him or another, or by prolonged interrogation under such circumstances as to render the statement involuntary." Thus to exclude under the Uniform Rules "it is not required that the suffering inflicted or threatened be 'physical' or that it be to the accused himself. Threats to a member of his family may render the confession involuntary."¹⁸³ In its comment, the Conference Committee also states that these variations from the Model Code rule "bring the exception more in line" with the decisions of the Supreme Court in *Ashcraft*¹⁸⁴ and kindred cases. While the Model Code rule is restricted in its application to a statement "by an accused that he has done or omitted something the doing or omission of which constitutes a crime or an essential part of a crime," Rule 63(6) of the Uniform Rules applies in terms to any "previous statement by [the accused] relative to the offense charged." On the face of it, this seems to expand greatly the present rule, which by most cases is limited in its application to "an acknowledgment in express words . . . of the truth of the guilty fact charged or some essential part of it."¹⁸⁵ Thus, by prevailing doctrine, the "confession rule" is inapplicable to exculpatory statements and to mere "acknowledgments of subordinate facts colorless with reference to actual guilt."¹⁸⁶ In other words, there must be an *animus confitendi*. But the text of the Uniform rule (as distinguished from its title,

¹⁸³ Comment of Conference Committee, Uniform Rules of Evidence 43 (1953).

¹⁸⁴ *Ashcraft v. Tennessee*, 322 U.S. 143 (1944).

¹⁸⁵ 3 Wigmore, Evidence § 821 (3d ed. 1940).

¹⁸⁶ *Ibid.* See *People v. Wynekoop*, 359 Ill. 124, 194 N.E. 276 (1934).

"Confessions") applies to any previous statement "relevant to the offense charged." In my view, there is considerable to be said for this change in existing law.

(e) *Judgments of Conviction*.—The Model Code (Rule 521) relaxes the hearsay rule so as to admit "evidence of a subsisting judgment adjudging a person guilty of a crime or misdemeanor . . . as tending to prove the facts recited therein and every fact essential to sustain the judgment." The Uniform Rules (Rule 63[20]) limit the exception to "evidence of a final judgment adjudging a person guilty of a felony."¹⁸⁷

¹⁸⁷ The Conference Committee's comment: "trials and convictions in traffic courts and possibly in misdemeanor cases generally, often do not have about them the tags of trustworthiness as they often are the result of expediency or compromise. To let in evidence of conviction of a traffic violation to prove negligence and responsibility in a civil case would seem to be going too far and for that reason this rule limits the admissibility of judgments of conviction under the hearsay exception to convictions of a felony." Uniform Rules of Evidence 49 (1953).



PART FIVE

Legal Philosophy and Reform

JURISPRUDENCE

EDMOND CAHN

SINCE it is impossible to persuade our readers that the phenomenon called McCarthyism was not the outstanding development in American jurisprudence during 1953, no attempt will be made here to do so. But our report need not confer additional publicity on the Senator from Wisconsin, because the role he has elected to play is altogether too obvious and hackneyed to deserve a special name of its own. Every previous period of popular tension and vague alarm has produced similar specimens, and if there were no Senator McCarthy on the national scene, history would probably find a way to concoct one. The time being far too early to permit an adequate perspective of unfolding circumstances, all we can do at present is itemize and record the juristic data so that later on they will not be overlooked.¹ If a collective label is considered indispensable, then let it be not "McCarthyism" but "atavism."

I

ATAVISM

The Revolt against the Judicial Process.—There is no more pervasive error than the one we commit when we confuse the familiar with the natural. Because of this fallacy, lawyers are apt to forget that the judicial process involves very severe exactions in terms of maturity, sophistication, and suspense of judgment. In a period of common anxiety, the people's smouldering impatience with the judicial process will burst quite readily through the civilized surface. If the state of fear should last long enough, even men trained in the traditions of the bar, who of all men ought to know that methods and objectives are functions of each other, may be heard to declare that they approve of a certain politician's objectives although they disapprove of his

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¹ In addition to the works to be cited in the course of this report, there have been several items of value touching on other aspects of jurisprudence. These are listed in an appendix to the report.

methods. Eventually, the lynch-mob which each of us carries in his heart and which suffers so many restraints and frustrations in a lifetime of law and order, may break the shackles of social control and find a berserk release.

The Resort to History.—In 1953 the American scene has been one of considerable fear and suspicion, not yet aggravated to the point of hysteria. While there is still time for rational persuasion, it is interesting to observe how many liberal voices, pleading for sobriety and fairness, have invoked the lessons of history and have reinforced their appeals with illustrations out of earlier periods of grave popular tension.

To this end Mr. Justice Hugo L. Black has underscored the parliamentary debates on Fox's libel bill at the end of the 18th century.² Francis Biddle, the last incumbent to perform the duties of Attorney General with noticeable appreciation of Anglo-American ideals, devoted much of his book *The Fear of Freedom* to depicting previous instances of repression and xenophobia in the history of the United States. Mr. Justice William O. Douglas has pointed to the witchcraft prosecutions³ and the trial of Sir Walter Raleigh. Judge Jerome Frank drew examples from the Athens of Thucydides⁴ and from England's shameful experience with Titus Oates and "the Popish

² *Beauharnais v. Illinois*, 343 U.S. 250, 271-72 (1952) (dissenting opinion).

³ Douglas, *A Challenge to the Bar*, 28 *Notre Dame Law* 497 (1953).

With respect, I submit that an attempted analogy to witches and witch-hunts is misleading and harmful. It implies that the existence of Communist espionage is as complete a fiction and fraud as the satanic powers imputed to "witches"; on this reasoning, the whole liberal position would seem to collapse the moment a single genuine instance of espionage has been proved by lawful evidence—which is a nonsensical result. Why should liberals even appear to deny the existence of Communist espionage in America or, for that matter, of American espionage in Soviet territory? ("Espionage" to us is "intelligence reports" to them, and *vice versa*.) This was Judge Jerome Frank's point in urging liberals not to disregard the objective dangers:

"Consider the notorious Titus Oates, a vile perjurer, who in 17th century England, by his lies swore innocent men to death. Macauley writes of Oates: 'His success proved that no romance is too wild to be received with faith by understandings which fear and hatred have disordered. His slanders were monstrous, but they were well timed. He spoke to a people made credulous by their passions.' But, let me add, those passions gripped them because there were then in England some conspiratorial men who, if they could, would have carried out the sort of plot Oates described." Address, "On Holding Abe Lincoln's Hat" delivered June 4, 1953, in New York City (not yet published in full, quoted with Judge Frank's permission). In this footnote, a "liberal" is any person who finds the prohibitions of the First Amendment so congenial that he will not think of exerting his ingenuity to circumvent them or to rationalize others' doing so, here or in Spain or in Russia.

⁴ See note 3 *supra*. I gather that Judge Frank refers to Cleon, the demagogic tanner, as described and castigated by Thucydides and Aristophanes. A generation ago, Professor G. W. Botsford called Cleon's kind of government (corrupting the people by violent harangues and by vilifying one's opponents) "theatrocracy." The word was too clumsy to survive but it does convey the idea. Botsford, *Hellenic History* 330 (1922).

Plot." These and other sane leaders have endeavored, without disregarding or minimizing the espionage aspects of Communist conspiracy, to keep their countrymen calm enough to preserve the values that distinguish American life from Soviet communism.

Among the historical parallels just mentioned, I happen to find greatest illustrative value in the period of Titus Oates. Certain it is that educated Englishmen have regarded the Oates interlude with more embarrassment than the trial, for example, of Sir Walter Raleigh, if only because most of middle class England fell dupe to Titus Oates' farrago, whereas the persecution of Sir Walter Raleigh was more in the nature of a gifted individual's personal tragedy. Be that as it may, the more important question is: When the American people appear to be slipping into the fen of fear, is it possible to restore their balance by recalling horrible instances of past martyrdoms? Would it not be wiser to choose historic episodes in which the final act turned out to be a glorious triumph for civic courage and liberty? After all, inveigh as we will against Raleigh's unjust trial, the fact remains that although it took the headsman fifteen years to get around to him, he was at last most definitively executed—a circumstance not calculated to increase the courage of slightly craven individuals in our present audience. Indeed, it seems probable that for every American who would like to escape the guilt of participating in conviction of the innocent, there are at least ten other Americans who would ardently prefer not to be the innocent man in the dock, that is, when the trial may have the denouement that Sir Walter Raleigh's had.

It seems to me that our American mythology is woefully deficient in its supply of heroic individuals who were acquitted or promptly vindicated. Peter Zenger's case was before the Revolution. And how many others are there? Our heroes of civil liberties are mainly statesmen like Jefferson and Madison, judges like Holmes and Brandeis, and perhaps a few laymen, such as Eugene Debs and Tom Mooney, who were required to serve time because, among other things, they would not serve the times. Meanwhile John Lilburne the magnificent⁵ remains almost completely unknown to Americans, though examples like his and William Penn's appear strikingly suitable for the inculcation of courage. Thoreau we revere, but we need more of Lilburne.

Some Notes on Habeas Corpus.—The most disturbing aspect of juristic atavism is not simply that it takes us to a lower level in the administration of justice, but that we feel the burden of guilt attached to our own degeneracy. In 1953, in cases involving deportation of

⁵ Wolfram, John Lilburne: Democracy's Pillar of Fire, 3 Syracuse L. Rev. 213 (1952). Lilburne had his times of suffering as well as his moments of triumph, but, come what might, he conferred dignity on our species by holding himself erect.

aliens, the Department of Justice was responding to writs of habeas corpus with returns⁶ that would have been unpalatable in the time of Queen Elizabeth I. In fact, it was during her reign that similar executive contumacies led to the judges' adopting the famous Resolution In Anderson.⁷ In Tudor and Stuart days⁸ the phrase with which to flout the courts was "reasons of state"; the corresponding phrase now is "national security." No wonder that educated observers reflect a mood of *déjà vu*!

Atavism and Anachronism.—One of the current manifestations of atavism is the tendency to strip past behavior of its context and judge it as though it were present behavior. Even in the world of scholarship, serious attempts have been made of late (by various self-constituted members, one supposes, of the Un-Athenian Activities Committee) to prove that Plato really felt disloyal to Athens and would have endeavored to assist Sparta; and learned philosophers debate the "evidence" as though their decision of that question would sustain or destroy Plato's philosophic achievement.⁹ By like token, in 1953 aliens¹⁰ of long residence in the United States were deported on the ground that they had once belonged to the Communist party, although they had severed all connection with it many years before

⁶ See the extract quoted in *United States ex rel. Watts v. Shaughnessy*, 206 F.2d 616, 617 (2d Cir. 1953).

⁷ I do not mean to exaggerate the courts' efforts toward independence before the reign of Charles I. The Resolution in Anderson (so called because reported in 1 Anderson 297 [1591], but note that a different version is given in Hallam's *Constitutional History of England* c. 5 [1908]) dealt only with the question whether, if the king's council committed a man to prison without trial or awaiting trial, the common-law courts were precluded from investigating and considering the propriety of admitting him to bail. In brief, was the king's or the council's command a sufficient answer to the writ without assigning the cause of the commitment? The Resolution may have been only a tentative and diffident step, but it indicated the direction English law would take in the ensuing century.

⁸ "The court hath no knowledge by this return, whether the evidence given were full and manifest, or doubtful, lame, and dark, or indeed evidence at all material to the issue, because it is not returned what evidence in particular, and as it was delivered, was given. For it is not possible to judge of that rightly, which is not exposed to a man's judgment." Chief Justice Vaughan in *Bushell's Case*, Vaughan's Reports 135, 6 How. St. Tr. 999, 1002 (1670).

⁹ The latest surrebutters in this debate appear in Professor Ronald B. Levinson's *In Defense of Plato* (1953) and Professor John Wild's *Plato's Modern Enemies and the Theory of Natural Law* c. 2 (1953).

¹⁰ "But this bill," said Madison of the Alien Act of 1798, "contains other features, still more alarming and dangerous. It dispenses with the trial by jury; it violates the judicial system; it confounds legislative, executive, and judicial powers; it punishes without trial; and it bestows upon the President despotic power over a numerous class of men. Are such measures consistent with our constitutional principles? And will an accumulation of power so extensive in the hands of the Executive, over aliens, secure to natives the blessings of republican liberty?" Address in the General Assembly of Virginia, January 23, 1799, in 6 *The Writings of James Madison* 332, 338 (G. Hunt ed. 1904).

the deportation legislation was adopted.¹¹ Whom the gods would destroy they first deprive of the time-dimension.

The Law-Stacking Plan of Our Times.—The revolt against the judicial process manifests itself most conspicuously in two important devices. By either of these, the court is denied the right to determine the operative facts in the case before it. The facts are, in effect, presented to the court in prefabricated form. To find an historical precedent for this situation, one must grope back to the dark and ignorant ages when secular courts would receive and act upon whatever findings the ecclesiastical courts might certify to them as the operative facts.

The first device consists in abuse of the legislative power to enact findings of fact. If by statements in a statutory preamble the legislature is able to determine the facts with legally conclusive force, then the judges can be reduced to automatic instruments of legislative will.¹² I believe this practice calls for serious re-examination and for the introduction of critical distinctions in an area where there has been too little differentiation.

The second technique for depriving the courts of the right to ascertain the operative facts consists in Congress' delegating that function to an executive official, for example, the Attorney General. As the record shows abundantly, the Department of Justice¹³ not only does not share the courts' view of due process of law;¹⁴ the Department seems on occasion to prefer secret and anonymous "files" to evidence verifiable by confrontation and cross-examination.

It is interesting to note how few lawyers who opposed the Court-packing plan of 1937 in the interest of judicial independence, have denounced these current law-stacking plans, which are enormously more destructive of constitutional balance and private liberty.

¹¹ Contrast the inhumanity of, say, the Masdtti deportation (sub nom. *Harisiades v. Shaughnessy*, 342 U.S. 580 [1952]) with the benevolence suffusing Judge Stanley H. Fuld's opinion for the New York Court of Appeals in *People ex rel. Kropp v. Shepsky*, 305 N.Y. 465, 113 N.E.2d 801 (1953).

¹² The three opinions composed respectively by Chief Judge Thomas W. Swan and Circuit Judges Learned Hand and Jerome Frank in *Addison v. Huron Stevedoring Corp.*, 204 F.2d 88 (2d Cir. 1953) furnish matter enough for a term course in jurisprudence if one only reads them concernedly and analytically, not the way a shut-in reads the sky, but the way a navigator does.

¹³ "During the 14 years I have sat on the Supreme Court I have seen many records of criminal trials. During that time it has seemed to me that the quality of prosecutors has markedly declined. . . . Sometimes they treated the courtroom not as a place of dignity, detached from the community, but as a place to unleash the fury of public passion." Mr. Justice William O. Douglas, *A Challenge to the Bar*, 28 *Notre Dame Law.* 497, 502-03 (1953).

¹⁴ There are lamentably many instances, as anyone knows who reads the advance sheets. The kind of performance I have in mind would be illustrated by *United States ex rel. Accardi v. Shaughnessy*, 206 F.2d 897 (2d Cir. 1953).

The Gap in the Ashwander Rules.—There is a great deal to be said in favor of the rules of judicial self-denial which Mr. Justice Brandeis aptly summarized in his concurring opinion in the *Ashwander* case.¹⁵ However, these rules lead to at least one peculiar result which has not attracted sufficient notice. In practical effect, the doctrine completely eliminates judicial review of any repressive legislation which is enacted in peacetime to become operative only in time of war. Under the *Ashwander* rules no one has standing to challenge this kind of legislation in peacetime, because no one has then suffered from it. And when advent of war brings the statute into operation, the prevailing circumstances will surely immunize it from any serious constitutional challenge. When and in what atmosphere, one may ponder, will the Supreme Court pass on the "concentration camp" provisions¹⁶ of the McCarran Act?

There are some who will say, "The short answer is that Congress could wait until the outbreak of war to enact repressive legislation, with the same consequences regarding judicial review." (I think we should be chary of that fashionable locution "the short answer." Sometimes it means only that the answerer is shortsighted or that he is short of temper because he suspects his answer falls short.) In any case, I am not quite convinced that because we know we may do some discreditable things when we are in a state of complete intoxication, we may as well proceed to do them while we still have command of our faculties. At this very moment, someone may be spending part of our tax remittances to construct those camps.

Proof by Percussion.—It is worth emphasizing that there is a genuine distinction in juristics between primitivism and atavism. When the communists took over Czechoslovakia in 1948 the changes they made illustrate this distinction. Hence, if any ominous comparison is appropriate between legal processes in America and those behind the Iron Curtain, the parallels would have to be sought not, for example, in Bucharest but in Prague.

Nearer home a working illustration could be found in Eugene O'Neill's *Emperor Jones*. Few of us can withstand the relentless and incessant iterations and reiterations of savage alarms. Accusation, repeated often enough, becomes confused with proof. Moreover, if the charge seems intrinsically incredible, people may come to believe

¹⁵ *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 346-48 (1936) (concurring opinion). One can detect signs that professional opinion may turn against the sound policies recapitulated by Mr. Justice Brandeis because they have been unsoundly extended by the current Court majority. See Vanderbilt, *The Doctrine of Separation of Powers* c. 3 (1953); Rostow, *The Democratic Character of Judicial Review*, 66 Harv. L. Rev. 193 (1952).

¹⁶ 64 Stat. 1019 (1950), 50 U.S.C. §§ 811-26 (Supp. 1952).

it for that very reason, assuming in their naïveté that no one would dare utter so bizarre an indictment unless he had evidence with which to substantiate it.

There is still another intriguing factor in the situation. It rests on our democratic expectation that no interest demanding recognition in the society should be thwarted completely. Generally speaking, in a democratic society every sort of claim, no matter how strange or unaccustomed, is considered to be entitled to a hearing and, if possible, to some measure of accommodation.¹⁷ In a time of juristic atavism these tacit assumptions can be exploited to great effect. No matter how ridiculous a cynic's demand may be, if he keeps on reiterating it in the face of categorical refusals, eventually it will acquire a certain prestige and the person or institution who refuses him begins to appear unreasonable, unco-operative, and even in due course, undemocratic. But he must continue insisting.

Suppose, for instance, that a senator should demand that the Supreme Court's Saturday conferences be conducted in front of television cameras. At first, as he would expect, the demand would appear insolent to the point of imbecility; and then his course would depend on how often he might obtain a refusal. If the senator can extract continual refusals, he can alienate the Court from the support of a large part of the citizenry. He will not do equally well if he is ignored, because reiteration pure and simple, without dramatic progression, may develop diminishing returns in public attention. The trick seems to consist in provoking the addressee of the demand into acting as a sort of "straight man" for reiterations, with just enough variety in volume and tempo to cumulate the public excitement.

Telltale Legalisms.—One of the familiar attributes of an atavistic period is the increased emphasis on strict law. Legal history abounds with instances. However, it is important to add that legalism in such a period means the legalism that favors the prosecutor, not the defendant. Mr. Justice Holmes epitomized the process in 1913 when he said, "When twenty years ago a vague terror went over the earth and the word socialism began to be heard, I thought and still think that fear was translated into doctrines that had no proper place in the Constitution or the common law."¹⁸

¹⁷ In the address mentioned in note 3 *supra*, Judge Jerome Frank closed with "a picture of a great American liberal. Stephen Douglas, as you know, spent years of effort, opposing the hot-heads in North and South, to prevent an American Civil War. Defeated for the presidency by Lincoln, Douglas at once urged the South not to secede. Then, at Lincoln's first inaugural, he appeared on the platform. When Lincoln awkwardly tried to dispose of his hat, Douglas seized it—and held it while Lincoln took the oath. I give you Abe Lincoln's hat in Douglas' hands as a symbol of liberalism."

¹⁸ Holmes, *Collected Legal Papers* 295 (1920).

These days the defendant who invokes the Fifth Amendment's protection against self-incrimination may be regarded as a scoundrel seeking to hide behind a shield of legalism.¹⁹ Consequently he may be subjected to a variety of drastic civil disabilities and punishments. The inferences involved are exceedingly convenient. They furnish a sort of ersatz proof, and if in the process of reasoning, it is necessary to assume that only scoundrels are wont to resort to their constitutional rights, and loyal Americans are those who do not use the Bill of Rights, then the assumption must be made.²⁰ This is scarcely what Jefferson and Madison had expected.

But if legalism is poison for the defendant, it is meat for the prosecutor.²¹ Threadbare distinctions between the civil and the criminal,²² between governmental and private action, and between "rights" and "privileges" have been exploited to a degree that crosses the border of cynicism. Privilege has been reduced to right's halfway house on the route to extinction.

Then there is the shoddy maxim that if a government is empowered to inflict a greater deprivation, there can be no juristic objection to its inflicting a lesser one. For example, it is reasoned that since the United States may constitutionally deport all resident aliens at will, by like token it may confer an unbridled discretion on the Attorney General to select those who are to be deported. When confronted by this sort of analysis, one should not only deny the validity of the inference; one should also challenge the major premise.

Out of the current atavistic period we may learn a new respect for the familiar common-law rules. The law of evidence suddenly seems far more sensible than we have ever realized. By safeguarding the judge and jury from malicious rumor, unverifiable hearsay, and cumulative repetition of testimony, it exhibits an admirable degree of psychological insight.

¹⁹ For an illustration of the use of the privilege by a man who was not merely "not guilty" but verily innocent of the charge against him, see *The Trial of William Penn and William Mead*, 6 How. St. Tr. 951, 957-58 (1670). For an excellent analysis, see Redlich & Frantz, *Does Silence Mean Guilt?* *The Nation*, June 6, 1953, p. 471.

²⁰ "Men of great presumption and little knowledge will hold a language which is contradicted by the whole course of history," said Edmund Burke in 1777, and we can share the indignation he must have felt when he said it. If they show the courage of their ignorance, why cannot we show that of our knowledge? Burke, *Letter to the Sheriffs of Bristol*, 1 Works 260 (1859).

²¹ "Harmless error" seems to be a doctrine available to the timorous and flustered only when they have been elevated to the bench. See *Stein v. New York*, 346 U.S. 156 (1953).

²² The Supreme Court majority does not think well enough of American citizenship and life in America when it classifies denaturalization and deportation as mere civil proceedings. *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952); *Knauer v. United States*, 328 U.S. 654 (1946). Philip Nolan could submit a useful brief on this issue.

The Two Whig Traditions.—At stake in the present wave of atavism are some of our most persistent traditions. Until now, whatever Englishmen might say on the subject, Americans have never been willing to admit that an indefinite sovereignty resides in the legislative branch of government. As Max Beloff put it: "There was a single political tradition of opposition to arbitrary government which went back to the political struggles of the 17th century. In Great Britain it had come to serve as the foundation for a theory of parliamentary sovereignty, in America as the basis of a theory of limited government."²³

Our political experience as a nation has not prepared our institutions or our people for a sudden conversion to the British canon of legislative supremacy.²⁴ The British way appears to be a very good way for Britain, though not without defects; certainly it has not been our way, nor should it become ours by default.

The Syndrome of Atavism.—One of atavism's interesting symptoms consists in the complete loss of a civilized respect for the dead. Since there is nothing easier than establishing an accusation against lips sealed by death, the work has a special appeal to calumniators and ghouls. Although this sort of maneuver has usually been considered repugnant to the traditions of American law, the statutes in many states making it a criminal libel to exhume and cast obloquy on the reposing reputation of a dead man, during a period of atavism not even the dead are left in peace.²⁵ Thus the currency of public morals becomes leaden and debased, and the image it is made to bear is Caliban's.

Another important symptom consists in the growing conviction that the process of government must necessarily be a "dirty business"

²³ The Debate on the American Revolution 1761-1783 at 6 (M. Beloff ed. 1949). Of course, the quoted statement is something of an over-simplification, as I suspect Mr. Beloff would grant. Intelligence often consists in recognizing the right oversimplifications for the purpose at hand.

²⁴ See the keen analysis in Gray, *The Sovereignty of Parliament Today*, 10 U. of Toronto L.J. 54 (1953).

²⁵ Cf. "An Account of the digging up of the Quarters of William Stayley, lately executed for High Treason, for that his relations abused the King's mercy," 6 How. St. Tr. 1501, 1511 (1678). For uttering some wild words about Charles II while drinking ale on November 14th, Stayley was accused of high treason on November 20th, tried and found guilty on the 21st, and executed on the 26th. Stayley having acted "very penitently" from the 21st to the 26th (which was quite ingenious of him, because the evidence in his trial showed so little that anyone could find to repent), Charles II granted his family's petition that his quarters might be delivered to them for private interment. But the relatives "abused the King's mercy" by causing several masses to be said over the quarters and holding a public funeral. Whereupon the king, "justly displeased," had Stayley's quarters disinterred and set up on the gates of the city of London, "and his head on London-bridge." This, it was supposed, would be quite a lesson to Stayley.

unrestrained by moral considerations. The governors, it is hinted, simply cannot perform their functions if they are prevented from resorting to methods which in private hands would be disgraceful and loathsome. There is a suggestion that all men are so corrupt that government has been inflicted on them for their sins. The governors become thus the inveterate enemies of the governed, and the government represents interests which are not only different from the citizens' interests, but contradictory and hostile to them. This too is a very old and deepseated political attitude, but it is not an attitude that has had much popular support heretofore in this country.

In a recent, brilliant speech, Mr. Justice William O. Douglas exposed the very core of infection. He said "[Responsible people] realize that the greatest peril to a people would come should the administrative agencies, the bureaucrats, the courts, the judges, and the procedure under which government operates ever become mere creatures of the popular will."²⁶

In other words, if democracy means the most complete, thoroughgoing, and pervasive execution of the people's will, then the zenith of democracy can mean the nadir of liberty. The greatest danger to liberty in a democracy arises not when the people turn away from their government, nor when the government is unresponsive to the will of the people. Liberty is in greatest danger when the people become so attuned to the government and the government so responsive to the people, that the aggregate political force of the society moves in an unchecked, unitary, and relentless direction. "Then," adds Mr. Justice Douglas, "hysteria and passion take over." (In actuality, the hysteria and passion must have taken over first, casting a mask of herdlike unanimity on the people's countenance.)

An Ancient Problem and a New Solution.—There is no escaping the fact that the judicial process entails many inconveniences, and the greatest of them is that witnesses simply cannot be relied on to give the answers the inquisitor desires. Consequently, considerable time and expense may be wasted, and in extreme instances the objective of the inquisition may be thwarted. No inquisitor worthy of the traditions of his profession will rest content with this state of affairs.

The problem is a very ancient and vexing one. In addition to the witness who is perversely unco-operative, there is the specially trying type who turns out to be excessively co-operative. For example, take Bernard Gui's *Manual of the Inquisitor*, which reflects the disappointing experiences of the thirteenth century:

It is very difficult to question and examine the Waldenses; to such an extent do they hide in duplicity and tricks of words, in order not to

²⁶ See note 3 *supra*.

be discovered, that one cannot draw from them the truth about their errors. Thus it is necessary at this point to say a few words about their deceit and guile.

They act in the following manner. When one of them is arrested for investigation, he usually presents himself fearlessly, as if his conscience were tranquil and without remorse. Ask him if he knows the cause of his arrest, and he will answer softly and with a smile: "My lord, I would be happy to learn it from your lips." Ask about his faith and belief: "I believe all that a good Christian believes," he declares. Try to learn what he means by a good Christian: "He who believes what is taught by the Holy Church." What does he call the Holy Church: "My lord," he replies, "what you yourself say and believe to be the Holy Church." If you say, "I believe it is the Roman Church ruled by the Pope and the other prelates under his authority," he replies: "And I too believe it," meaning that I am convinced that that is indeed your belief.²⁷

Brother Bernard seems to have been driven nearly to distraction by recalcitrant witnesses. He recommended that they be put in the dungeon for life or until they made a full and voluntary confession. In those days, although a confession did not automatically lead to radio, television, and lecturing careers, it did usher in, as it does today, a colorful and assured livelihood in the role of informer.

At one time or another, inquisitors have employed various practical devices in order to elicit satisfactory testimony. Physical torture, psychological torture, and threats to the witness' family have often proved successful. None of these, however, is completely reliable. There are witnesses who simply forget in the courtroom the story they have memorized so accurately in the torture chamber, and there are others who have no objection whatever to the execution of their wives.

It was during the Fort Monmouth investigation in the fall of 1953 that this perennial problem was finally solved. No outsiders were admitted to the room in which the questioning was alleged to be proceeding. At intervals—once or twice a day—Senator McCarthy would emerge from the room, close the door behind him, and tell the representatives of the press what had been happening inside. The newspapers (with a few suspicious exceptions) printed this information daily as authentic news. In his characteristic fashion, the Senator had solved the age-old problem of the undependable witness.

With due regard to the current emphasis on economy in government, it is fairly predictable that the invention will soon be perfected by eliminating waste motion from the process. Surely there is no discernible need to expend time and money on having a witness

²⁷ Bernard Gui, *Manual of the Inquisitor* in *1 Introduction to Contemporary Civilization in the West* 160, 163 (J. Buchler et al., eds. 1946).

physically present in the room. The same end can be achieved—for all we know, it has already been achieved—with equal efficiency without him. As usual, the Russians will undoubtedly claim that they were the first to invent this device,²⁸ but everyone knows what such claims are worth.

II

THE GRAND OLD CAUSE

What History Suggests.—While it would be unwise to assume that periods like ours follow any fixed or rigid tropism, legal history seems to intimate that when liberty suffers at the hands of government, some compensatory sop can be expected in the form of more nearly equal protection of the laws. On the current American scene, this may consist of official implementation of a Supreme Court decision outlawing racial segregation in the public schools.

Past experience also indicates that the fog of fear may blow away much more rapidly than it gathered. The horrors of the "Popish Plot" in England began with the year 1678. Oddly enough, while the plot still enveloped the nation like a poisonous miasma, 1679 became one of history's golden dates by reason of the enactment of the Habeas Corpus Act; and within ten or twelve years after the theatrics of Titus Oates the Glorious Revolution was accomplished and England's Bill of Rights was drafted and accepted. As Thomas Jefferson once wrote to James Madison: "We are never permitted to despair of the commonwealth."²⁹

No one saw the nature of the democratic dilemma more clearly than Madison, at least in its specifically American implications. It was all very well, he thought, for Jefferson to insist on a bill of rights in the United States Constitution, but Jefferson was still in Bourbon France and his thinking consciously or subconsciously reflected what he saw there. For America, Madison envisaged something quite different:

Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents. This is a truth

²⁸ In 1953, one of the most felicitous typographical errors of all time occurred, at page 129 of Ignazio Silone's fine novel, *A Handful of Blackberries*. To appreciate the point, it is necessary to know only that "Oscar" is a Communist Party functionary, a particularly arrogant one. The text reads, "Oscar laughed aloud. It was a strange laugh that revealed his mental denture." (Emphasis supplied.)

²⁹ Letter to James Madison, December 20, 1787, .6 *The Writings of Thomas Jefferson* 385 (Bergh ed. 1907).

of great importance, but not yet sufficiently attended to; and is probably more strongly impressed on my mind by facts, and reflections suggested by them, than on yours which has contemplated abuses of power issuing from a very different quarter. Wherever there is an interest and power to do wrong, wrong will generally be done, and not less readily by a powerful and interested party than by a powerful and interested prince. . . . What use then may be asked can a bill of rights serve in popular Governments? I answer the two following which, though less essential than in other Governments, sufficiently recommend the precaution: 1. The political truths declared in that solemn manner acquire by degrees the character of fundamental maxims of free Government, and as they become incorporated with the national sentiment, counteract the impulses of interest and passion. 2. Altho it be generally true as above stated that the danger of oppression lies in the interested majorities of the people rather than in usurped acts of the Government, yet there may be occasions on which the evil may spring from the latter source; and on such, a bill of rights will be a good ground for an appeal to the sense of the community.³⁰

As an epitome of the American political creed, these lines of Madison's can scarcely be improved on. But creeds do not ignite themselves, they remain inert until some spiritual spark animates and enflames them. In the American saga something more was needed than a sound intellectual formulation.

I think we can find signs of the missing element in the writings of Henry Fielding, the man who was Anglo-Saxon law's most valuable

³⁰ Letter to Jefferson, October 17, 1788, in 5 The Writings of James Madison 269, 272-73 (G. Hunt ed. 1904).

If there is any psychological worth in the canon of interpretation I am about to suggest, we may accept the above quotation as Madison's *minimum* rationale and may assume that on later occasions he would probably assign a higher value to the Bill of Rights. This result follows from applying what may be called "the canon of concession."

Assume that *A*, in a bilateral controversy, has recommended a specific transaction and assigned reasons *a*, *b*, and *c* in support of it, while *B* has countered with objections *-x* and *-y*. Now assume further that after protracted correspondence *B* is about to concede the controversy. He prepares to write *A* to that effect. (We are not concerned immediately with *B*'s private motives but with evaluating what he writes.) *B* will, I suggest, generally proceed as follows:

(1) He will continue to reject reasons *a*, *b*, and *c* (or as many of them as possible) and deny their validity as offsets to *-x* and *-y*; (2) he will try to find reasons *x* and *y* (not advanced by *A*) to cancel objections *-x* and *-y*. He may now restate one of *A*'s arguments in a diluted and weakened version, which we may call *c'*. In most cases, he will imply that *A* has erred in some manner or other, has leaned on the wrong reasons, and has presented the case in a misleading light—if only in failing to put forward reasons *x* and *y*; and (3) since reasons *x* and *y* (the "face-savers") are *B*'s own and are *pro hac vice* serving a special psychological purpose in addition to their enduring logical function, for the moment they will appear to reduce and restrict *A*'s main proposal as well as *B*'s adhesion to it. Subsequently, however, *B*, having become one of the acknowledged backers of the proposal, may feel free to embrace any or all of reasons *a*, *b*, and *c* without experiencing a sense of contradiction or embarrassment.

Quaere: Can this reasoning be applied to certain types of judicial opinion?

gift to the world of literature.³¹ Fielding lived and wrote before the great Whig tradition was bifurcated, as we have seen it was, during the 1760s. His political spirit remains therefore just as authentic for Americans as for Britons.

In Fielding's works there is always the shrewdly skeptical, generous, and independent attitude of *relaxed* self-respect, once incarnate in Whiggism, that can make the courses of life savorous and pleasant in their sequence. Fielding is worldly as he is kindhearted; and he senses the profound fraud behind the posturings of pseudo-great politicians. At a certain point in *Jonathan Wild* he has a lady tell us her experiences in an unnamed primitive country.³² She relates how she came to be introduced to "the chief magistrate of this country," and explains:

He is obliged, in time of peace, to hear the complaint of every person in his dominions and to render him justice, for which purpose every one may demand an audience of him, unless during the hour which he is allowed for dinner, when he sits alone at the table, and is attended in the most public manner with more than European ceremony. This is done to create an awe and respect towards him in the eye of the vulgar; but lest it should elevate him too much in his own opinion, in order to his humiliation he receives every evening in private, from a kind of beadle, a gentle kick on his posteriors. . . .

APPENDIX: OTHER NOTEWORTHY ITEMS

Books.—Edwin W. Patterson, *Jurisprudence: Men and Ideas of the Law* (1953), most judiciously reviewed by W. Friedmann in 28 N.Y.U.L. Rev. 1340 (1953); *Holmes-Laski Letters* (Howe ed. 1953), reviewed in a charmingly belligerent mood by Rebecca West, 67 Harv. L. Rev. 361 (1953) in contrast to my subdued and pacific reaction, 28 N.Y.U.L. Rev. 764 (1953); David J. Mays, *Edmund Pendleton, 1721-1803: A Biography* (1952), a classic except that it is being read widely; Clinton Rossiter, *Seedtime of the Republic* (1953); Fred V. Cahill, Jr., *Judicial Legislation* (1952), the stimulus to a splendid challenge from George D. Braden, Book Review, 62 Yale L. J. 673 (1953).

Articles.—Jerome Frank, "Some Tame Reflections on Some Wild Facts" in *Vision & Action* 56 (S. Ratner ed. 1953); Mr. Justice Robert H. Jackson, "The American Bar Center: A Testimony to Our Faith in the Rule of Law," 40 A.B.A.J. 19 (1954), containing an eloquent statement of the pro-

³¹ 1954 marks the lapse of two hundred years since Henry Fielding went to an obscure grave in Portugal. It would be an act of piety on the part of British, Commonwealth, and American lawyers to signalize the occasion. It would also provide an opportunity, which the bar always and everywhere needs, to demonstrate by Fielding's example that a deep professional concern with the administration of justice does not necessarily convert a human being into a pompous donkey.

³² Bk. IV, c. XI.

fession's creed; C. Herman Pritchett, "Libertarian Motivations on the Vinson Court," 47 *Am. Pol. Sci. Rev.* 321 (1953); H. L. A. Hart, "Philosophy of Law and Jurisprudence in Britain (1945-1952)," 2 *Am. J. Comp. L.* 355 (1953); Jerome Frank, "Judicial Fact-Finding and Psychology," 14 *Ohio St. L. J.* 183 (1953); Ranyard West, "The Importance of Modern Psychiatry to the Lawyer," *id.* at 138; Jerome Hall & Karl Menninger, "A Dual Review of 'Psychiatry and the Law' by M. S. Guttmacher & Henry Weihofen," 38 *Iowa L. Rev.* 687 (1953), two very perceptive commentaries; George K. Gardner, "The Great Charter and the Case of *Angilly v. United States*," 67 *Harv. L. Rev.* 1 (1953); Mark DeWolfe Howe, "Political Theory and the Nature of Liberty," 67 *Harv. L. Rev.* 91 (1953), a beginning on a significant road; M. J. Aronson, "The Juridical Evolutionism of James Coolidge Carter," 10 *U. of Toronto L.J.* 1 (1953); Albert A. Ehrenzweig, "A Psychoanalysis of Negligence," 47 *N.U.L. Rev.* 855 (1953); Helen Silving, "The Jurisprudence of the Old Testament," 28 *N.Y.U.L. Rev.* 1129 (1953).

Sui Generis.—K. N. Llewellyn, Book Review [a study of the Pogo books as legal philosophy], 20 *U. of Chi. L. Rev.* 766 (1953).

JUDICIAL ADMINISTRATION

SHELDEN D. ELLIOTT

IN TERMS of accomplished improvements in judicial administration, the year 1953 was steady but not spectacular. In terms of groundwork hopefully laid for future reforms, both in England and in this country, the record is more impressive. The long-awaited and comprehensive report of the Evershed Committee was presented to Parliament in July.¹ American state legislatures, traditionally inclined to be cautious when it comes to court reform, nevertheless showed venturesome willingness in some states—at least a willingness to appoint commissions, or to assign existing agencies, to study or prepare comprehensive proposals for court reorganization and improvement.

Highlights, and some shadows, in the general scene for 1953 appear in the following paragraphs. They have been grouped under specific headings for convenience in reference, a device that sometimes loses the woods for the trees. To see the picture in proper perspective, one needs to take the longer and larger view—an overall vista of progress measured in ratings and scores. The scoring system used in 1950 provided a relative ranking of states in the order of their respective degrees of adoption of at least minimal standards of judicial administration.² In the 1950 tabulation, New Jersey, California, Delaware and Wisconsin ranked as the top four, in that order.³ A partial updating of that report, covering twenty-two of the states, shows that by 1953 Utah and Minnesota have moved into second and third positions, respectively, and Vermont and Virginia have considerably improved their standings.⁴ As a measure of cumulative progress for all of the twenty-two states in the four-year period since 1949, including five that reported "no progress,"⁵ the advance is impressive, more than doubling the earlier aggregate score. When the full tally for forty-eight states is recorded, the results will show the picture in complete, and it is hoped gratifying, perspective.

General Reforms and Surveys.—Of the several proposals under

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¹ Final Report of the Committee on Supreme Court Practice and Procedure (1953).

² Porter, *Minimum Standards of Judicial Administration: The Extent of Their Acceptance*, 36 A.B.A.J. 614 (1950).

³ Id. at 616.

⁴ American Bar Ass'n, *Sec. of Jud. Admin., Report of Director of State Committees* (Aug. 1953). This relative standing may be misleading, however, since California and Delaware were among the nonreporting states, and may actually have improved sufficiently to retain their former positions.

⁵ Maine, Mississippi, New Mexico, Tennessee, West Virginia.

legislative consideration in 1953, the projected new Judiciary Article in Illinois was the most far-reaching in scope, and perhaps the most widely publicized.⁶ Although it passed the Senate, it was defeated in the House. Less comprehensive, but still substantial, proposals in Connecticut⁷ and Ohio⁸ were also blocked in the course of passage by the legislatures.

A promising beginning toward major reform in New York was inaugurated by the authorization and appointment of a Temporary Commission on the Courts to survey and report to the next Legislature on (1) means of relieving calendar congestion, (2) simplification of practice and procedure, (3) enlargement of the rule-making power, (4) reduction of costs of litigation and appeals, (5) improved methods of selecting judges, (6) a uniform method of jury selection, and (7) changes in substantive law to improve the administration of justice.⁹ It has been reported that somewhat similar though less extensive studies have been authorized in Maine¹⁰ and Maryland.¹¹

The end product of six years of study of Supreme Court practice and procedure in England by the Evershed Committee was submitted by the Lord High Chancellor to Parliament in July 1953.¹² The report and recommendations cover a wide range of topics from initial approach and pleadings to execution of judgments and procedure on appeal. There are sections of the report dealing with "The Limitation and Assessment of Costs"¹³ and with "Counsel's Fees,"¹⁴ as well as with "Litigation at the Public Expense"¹⁵ and with "Distribution of Business in the High Court."¹⁶ To those who anticipated proposals for drastic innovations in the British system of judicial administration, the report may fall considerably short of expectations. In many instances the Committee, in lieu of basic changes, recommended the "more robust" exercise of powers and authority already conferred. Nevertheless, if all or a substantial number of the 229 recommendations are put into operation, the resultant simplifications in procedure should be substantial in cumulative effect.

⁶ 1953 Ill. Senate Joint Res. No. 23. For a brief summary of its provisions see Elliott, *Judicial Administration*, 1952 Annual Surv. Am. L. 780, 28 N.Y.U.L. Rev. 779 (1953).

⁷ 1953 Conn. Senate Bill No. 692.

⁸ 1953 Ohio Senate Joint Res. No. 31.

⁹ N.Y. Laws 1953, c. 591.

¹⁰ Jones, *From the State Capitals* (Jan. 31, 1953).

¹¹ Jones, *From the State Capitals* (April 11, 1953). And see Report of Commission to Study the Judiciary of Maryland (Jan. 1953).

¹² See note 1 *supra*.

¹³ Section X, p. 232.

¹⁴ Section XI, p. 268.

¹⁵ Section IX, p. 216.

¹⁶ Section XII, p. 298.

Less numerous, but possibly more fundamental, proposals for state court systems in the United States were advocated by the Conference of Chief Justices at their annual meeting in August 1953.¹⁷ Their recommendations included the creation and functions of administrative offices, judicial conferences and judicial councils; the provision of minimum ten-year terms for all trial and appellate judges; permanent chief justices for courts of last resort; increases in judicial salaries; and the adoption of adequate judicial retirement systems.

Another and more comprehensive analysis of basic requisites for a sound judicial system provides a valuable checklist of essential factors for efficient court organization and administration.¹⁸ It includes a simplified and unified court system, improved selection of judges and juries, competent court staffs and administrative supervision, expedition of judicial business, and the collection, dissemination and use of current statistics as a basis for efficient allocation of judicial manpower.

Among the surveys and reports of past accomplishments in judicial and procedural reforms, there have been summary reviews of measures and methods in Florida,¹⁹ New Jersey,²⁰ New York,²¹ Puerto Rico,²² and Virginia.²³ Recommendations and proposals for revised judiciary articles have been delineated in Minnesota²⁴ and Texas.²⁵ Suggestions as to how to secure a judicial reform through enlisting public support have also been offered, based on the successful experience in securing such support in New Jersey.²⁶

Judicial Selection and Tenure.—During the year, attention has been sharply focused on the Missouri plan, or variants of it, for the selection of judges. In Kansas a proposal for the plan's adoption reached legislative consideration but died in committee.²⁷ Substantial support by members of the bar for similar plans in Michigan²⁸ and

¹⁷ 1953 Conference of Chief Justices, 26 State Govt. 241 (1953).

¹⁸ Vanderbilt, *The Essentials of a Sound Judicial System*, 48 N.U.L. Rev. 1 (1953).

¹⁹ Feibelman, *Florida Blazes the Path of Legislative and Judicial Reform*, 53 Com. L.J. 237 (1953).

²⁰ Vanderbilt, *The Reorganization of the New Jersey Courts*, 34 Chi. Bar Record 161 (1953).

²¹ Nims, *New York's 100 Years Struggle for Better Civil Justice*, 25 N.Y. State Bar Bull. 83 (1953).

²² Adler, *The New Judiciary Act of Puerto Rico: A Definitive Court Reorganization*, 8 Record of Ass'n of Bar of City of N.Y. 76 (1953); Snyder, *New Puerto Rico Judicial System is Modern and Efficient*, 36 J. Am. Jud. Soc'y 134 (1953).

²³ Whittle, *Streamlined Justice in Virginia*, 10 Wash. & Lee L. Rev. 9 (1953).

²⁴ Final Report of the Special Committee on Revision of the Constitution of the State of Minnesota, 10 Bench & Bar of Minn. 52 (Sept. 1953).

²⁵ Proposed Judiciary Article, 16 Texas B.J. 12 (1953).

²⁶ Paul, *How to Sell Judicial Reform*, 42 Nat. Munic. Rev. 280 (1953).

²⁷ 1953 Kan. Senate Concurrent Res. No. 6.

²⁸ Bar Favors Change in Method of Judicial Selection, 32 Mich. State B.J. 30 (Oct. 1953).

Nebraska²⁹ has been shown, and bar association committees in Georgia³⁰ and New York³¹ have advocated its adoption in those states, although bar members in the latter have also favored retention of the present elective system.³² Support for the Missouri or American Bar Association Plan has been voiced in Chicago³³ and Florida,³⁴ and for the elective system in Detroit.³⁵ Discussion of the proposed Pennsylvania Plan for judicial appointment by the governor from a selected panel has indicated similar divergence of viewpoints.³⁶ In Wisconsin, the Judicial Council has been directed to study methods of judicial selection and to submit to the 1955 Legislature a plan "offering the most acceptable substitute for direct election."³⁷

A comprehensive survey of sources from which appellate judges are appointed, as between direct appointment from the bar and elevation from the trial courts, supports the desirability of a mixture of both methods.³⁸ In Indiana, a new law provides that only persons admitted to practice before the state supreme court or acting as judicial officers are eligible for judicial appointments.³⁹ A report on English methods reviews the tradition of nonpolitical appointments to the bench in that country and suggests the desirability of eliminating politics from judicial selection in the United States.⁴⁰

In the area of judicial tenure, Wisconsin has enacted a law that judges elected to fill vacancies shall serve full initial terms rather than merely the balance of unexpired terms, before running for re-election.⁴¹ In Oklahoma, a proposal to extend the terms of district court judges from four years to eight years failed to secure legislative approval,⁴² and a bill in New Jersey to extend initial terms of county judges from

²⁹ Hastings, President's Address, 32 Neb. L. Rev. 142, 144 (1953).

³⁰ Report of Committee of Georgia Bar Association on Jurisprudence, Law Reform and Procedure, 15 Ga. B.J. 445, 446 (1953). The report reaffirms previous support of "a modified form of the Missouri Plan concerning judicial tenure."

³¹ Association Activities, 8 Record of Bar Ass'n of City of N.Y. 1, 2 (Jan. 1953); Association News, 10 Bar Bull. N.Y. County Lawyers Ass'n 120, 122 (1953). And see, Gallantz, Judicial Selection—A Metropolitan Proposal, 25 N.Y. State Bar Bull. 101 (1953).

³² Runals, Judicial Selection—An Upstate View, 25 N.Y. State Bar Bull. 90 (1953).

³³ Ewing, Non-Partisan Selection of Judges, 34 Chi. Bar Record 465 (1953).

³⁴ Tucker, Judges—Selecting the Best Men, 6 U. of Fla. L. Rev. 195 (1953).

³⁵ Comment, The Judiciary Re-Examined—How Do They Get There?, 16 U. of Detroit L.J. 180 (1953).

³⁶ Fox, Judges and Politics, 27 Temple L.Q. 1 (1953); Dechert & Frankel, We Must Elect Bar-Approved Sitting Judges, 16 The Shingle 208 (1953); Clark, Sitting Judges, Governor Fine's Appointees and the 1953 Election, 16 id. at 214.

³⁷ 1953 Wis. Assembly Joint Res. No. 79A.

³⁸ Tunstall, Why Ignore the Bar?, 38 Va. L. Rev. 1091 (1952).

³⁹ Ind. Laws 1953, c. 254.

⁴⁰ Erskine, The Selection of Judges in England: A Standard for Comparison, 39 A.B.A.J. 279 (1953).

⁴¹ Wis. Laws 1953, c. 606.

⁴² 1953 Okla. House Bill No. 609.

five years to seven years, with life tenure on subsequent reappointment, also failed.⁴³

Judicial Salaries and Retirement.—Judicial salary increases, some of them substantial, were approved in more than half of the states whose legislatures met in 1953. For the highest appellate courts there were salary advances of \$5,500 in Missouri, \$5,000 in Nevada, \$3,000 to \$3,500 in Colorado, Oregon, Washington and Wyoming, and \$2,000 to \$2,500 in California, Maryland, New Hampshire and North Dakota.⁴⁴ For trial courts of general jurisdiction, increases of from \$2,000 to \$3,000 were approved in Missouri, New Hampshire, Oregon, Utah and Wyoming.⁴⁵ The previous median national salary levels for highest appellate court judges and trial court judges were \$12,000 and \$9,000 respectively.⁴⁶ As a result of 1953 increases, these median salaries are raised to \$12,500 and \$11,000. Although the 1953 Congress failed to act on pending legislation to increase the salaries of federal judges,⁴⁷ there has been growing support for favorable action.⁴⁸

New retirement plans were adopted in Indiana⁴⁹ and Kansas.⁵⁰ The former will provide maximum annuities of \$4,000 after sixteen years of service. The latter is to be financed by a combination of salary percentage contributions and special filing fees, and permits retirement at age sixty-five, with retirement at age seventy mandatory. A new retirement plan has been proposed for judges in Kentucky,⁵¹ and the Tennessee requirement that periods of judicial service to qualify for benefits be consecutive has been eliminated by amendment.⁵² In Wisconsin, county judges have been brought into the judicial retirement system.⁵³ Pension provisions for orphaned children of deceased judges were adopted in Connecticut,⁵⁴ and for widows of judges in Maine⁵⁵ and Oregon.⁵⁶

Apart from direct salary increases and retirement benefits, several states took steps to facilitate future increases or to provide supple-

⁴³ 1953 N.J. Senate Bill No. 329.

⁴⁴ Inst. of Jud. Admin., Preliminary Check List of 1953 Legislation on Judicial Administration 7-10 (Aug. 15, 1953).

⁴⁵ Ibid.

⁴⁶ The Book of the States 1952-1953, 459-60. (1952).

⁴⁷ 1953 Sen. No. 1663.

⁴⁸ Getting Our Money's Worth, 36 J. Am. Jud. Soc'y 163 (1953); Hayes, Salaries—United States Judges and Members of Congress, 24 Okla. Bar Ass'n J. 1475 (1953).

⁴⁹ Ind. Laws 1953, c. 157.

⁵⁰ Kan. Laws 1953, c. 182.

⁵¹ Pension Plan for Judges, 17 Ky. State B.J. 147 (1953).

⁵² Tenn. Laws 1953, c. 61.

⁵³ Wis. Laws 1953, c. 461.

⁵⁴ Conn. Pub. Acts 1953, No. 260.

⁵⁵ Me. Pub. Laws 1953, cc. 338, 339.

⁵⁶ Ore. Laws 1953, c. 529.

mental assistance. Thus, in New Mexico the voters approved constitutional amendments to permit the Legislature to fix supreme court and district court salaries,⁵⁷ and a proposed Arkansas constitutional amendment to enable legislative fixing of judicial salaries will be submitted to the voters in 1954.⁵⁸ Expense allowances for judges were approved in Indiana⁵⁹ and Georgia,⁶⁰ and Florida Supreme Court justices have been authorized to employ clerks or research assistants.⁶¹

Judicial Conduct, Discipline, and Removal.—A proposed method of removing district judges in Nevada for misconduct and malfeasance, after preliminary ruling by the supreme court on the charges, and assignment to a different district for hearing, was vetoed by the governor.⁶² Present provisions and methods for the removal of judges in all of the forty-eight states have been comprehensively surveyed in a 1953 report of the Wisconsin Judicial Council.⁶³

Limitations on the practice of law by judges of certain courts were enacted in Connecticut,⁶⁴ and Missouri has prohibited law practice by circuit judges.⁶⁵ New York, on the other hand, has expressly permitted New York City justices and magistrates to receive supplemental income for lecturing, instructing or writing, if it does not interfere with the performance of their judicial duties.⁶⁶

On the subject of judicial demeanor, as a matter more of dignity and decorum than of possible disciplinary concern, attention has been called to the need for proper bearing, manners and courtroom courtesy on the part of judges, particularly on the trial bench.⁶⁷ Such a requirement is also embodied in Canon 10 of the American Bar Association Canons of Judicial Ethics.⁶⁸

Judicial Councils and Judicial Conferences.—Florida was added this year to the states having judicial councils. The 1953 Legislature authorized a Council composed of judges, the attorney general, four members of the bar, and nine laymen, to make a continuing study of the organization, procedure, practice and work of the Florida courts.⁶⁹ In West Virginia, however, the Legislature substantially impaired the work

⁵⁷ 1953 N.M. House Joint Res. Nos. 15, 16.

⁵⁸ 1953 Ark. House Joint Res. No. 5.

⁵⁹ Ind. Laws 1953, c. 25.

⁶⁰ Ga. Laws 1953, No. 487.

⁶¹ Fla. Acts 1953, c. 28115, Item 57.

⁶² Jones, *From the State Capitals* (March 7, 1953).

⁶³ Wis. Jud. Council, 1953 Biennial Report, App. 10, p. 36.

⁶⁴ Conn. Pub. Acts 1953, No. 261.

⁶⁵ Mo. Rev. Stat. Ann. § 478.013 (Supp. 1953).

⁶⁶ N.Y. Laws 1953, c. 395.

⁶⁷ Vanderbilt, *supra* note 18, at 11.

⁶⁸ For a recent reprinting of the Canons, see *Canons of Judicial Ethics*, 30 Dicta 333 (1953).

⁶⁹ Fla. Laws 1953, c. 28062.

of that state's Judicial Council by repealing existing statutory provisions for a paid executive secretary, for travel expenses of Council members, and for office space in the state capitol.⁷⁰

In its 1953 biennial report, the Judicial Council of Wisconsin has announced major studies projected for the 1953-1955 biennium on (1) court organization, and (2) the functioning of pre-trial conferences.⁷¹ In addition, as noted, the Council has been directed by the Wisconsin Legislature to make recommendations on a substitute for direct election of judges.⁷² A history of judicial councils and a study of their functioning in Massachusetts, California, Kansas and New York is included in the 1953 report of the Kansas Judicial Council.⁷³

Increased impetus to the growing judicial conference movement was given by the Tennessee Legislature's creation of a Judicial Conference in that state, to meet annually to consider matters relating to official judicial duties and to recommend improvements in the administration of justice.⁷⁴ A Colorado enactment provides for the summoning of conferences of judges in the state's respective judicial departments,⁷⁵ and the Massachusetts Legislature has requested the Judicial Council to investigate and report on a suggestion for holding annual judicial conferences.⁷⁶

Two reports have been issued by the Judicial Conference of the United States, one covering a special session in March 1953,⁷⁷ and the other the regular annual meeting in September.⁷⁸ Both reports, in addition to summarizing current docket status in the federal courts, deal with a number of topics pertaining to judicial administration in the federal system, stressing in particular the need for additional judge-ships.⁷⁹

Court Integration and Unification.—Major proposals for the integration and unification of the court systems in Illinois⁸⁰ and Connecticut,⁸¹ respectively, failed to pass the legislatures in those two states, as

⁷⁰ W. Va. Laws 1953, c. 142.

⁷¹ Wis. Jud. Council, 1953 Biennial Report 13.

⁷² See note 37 *supra*.

⁷³ Nims, Four Judicial Councils, 27 Kan. Jud. Council Bull., pt. 2, 26 (1953).

⁷⁴ Tenn. Pub. Acts 1953, c. 129.

⁷⁵ Colo. Laws 1953, c. 82.

⁷⁶ Mass. Resolves of 1953, c. 20.

⁷⁷ Report of the Proceedings of a Special Session of the Judicial Conference of the United States (1953).

⁷⁸ Report of the Proceedings of the Regular Annual Meeting of the Judicial Conference of the United States (1953). For a discussion of the 1952 report, see Stayton, Modern Judicial Administration, 16 Texas B.J. 205 (1953).

⁷⁹ See also Shafroth, The Federal Courts Need More Judges, 37 J. Am. Jud. Soc'y 9 (1953).

⁸⁰ This was included in the over-all revision of the Judiciary Article submitted in Illinois. See note 6 *supra*.

⁸¹ See note 7 *supra*. And see Clark, Realistic Court Reform—A Study of Pending Proposals, 27 Conn. B.J. 11 (1953).

did also a proposal to integrate the lower courts in New Jersey,⁸² and one to reorganize the district courts in Massachusetts.⁸³ Something was salvaged from the defeats in Connecticut and Massachusetts, however, by the referral in one case to the Legislative Council⁸⁴ and in the other to the next session of the General Court,⁸⁵ for further consideration.

In Michigan, proposals to reorganize and integrate the courts of Wayne County into a single metropolitan court,⁸⁶ and one to replace justice courts with municipal courts in cities over 25,000 population⁸⁷ were unsuccessful. Meanwhile, in California, reorganization of the lower court system under the constitutional amendment adopted in 1950 was completed in January 1953, the consolidation of such courts resulting in an overall reduction of judicial positions therein from 838 to 505 in number.⁸⁸

Groundwork for possible future unification of the Arkansas courts has been reportedly suggested to the Judicial Council there,⁸⁹ and has also been initiated for the lower courts in Maine by the Municipal Judges Association of that state.⁹⁰ From these, as well as from renewed attacks on the problem in other states, it can be hoped that eventually the modernization and streamlining of state courts will become a rule rather than the all-too-rare exception it is now.

Court Administration, Congestion, and Statistics.—Reports on court operations and caseloads show in general a continuing increase in the volume of litigation to be handled, particularly in the trial courts of the larger metropolitan areas. Superadded to the current backlog of pending cases, this increase puts to a severe test the already overburdened judicial machinery and poses a pressing challenge. Basic to any solution is the need for centralized collection and publication of current judicial statistics—a need that has been recognized and provided for in two more states, Colorado⁹¹ and Oregon.⁹² The usefulness of such statistical information is demonstrated in the first annual report of the

⁸² 1953 N.J. Assembly Bill No. 36.

⁸³ 1953 Mass. Senate Bill No. 247. For a discussion of the bill see Urbano, Summary of the District Court Survey Committee's Report with Draft Act, 37 Mass. L.Q. 1 (1952).

⁸⁴ 1953 Conn. Senate Joint Res. No. 44.

⁸⁵ 1953 Mass. Senate Bill No. 784.

⁸⁶ 1953 Mich. Senate Joint Res. K; 1953 Mich. Senate Bill No. 23. And see Langs, The Metropolitan Court Bill, 32 Mich. State B.J. 25 (March 1953); Langs, The Metropolitan Court, 21 Detroit Lawyer 29 (1953).

⁸⁷ See Judicial Administration Legislative Summary, 37 J. Am. Jud. Soc'y 49 (1953).

⁸⁸ Report on the Reorganization of the Lower Courts, Jud. Council of Cal., 14th Biennial Report 13, 21 (1953).

⁸⁹ Jones, From the State Capitals (Sept. 29, 1953).

⁹⁰ See Judicial Administration Legislative Summary, 36 J. Am. Jud. Soc'y 148, 149 (1953).

⁹¹ Colo. Laws 1953, c. 236.

⁹² Ore. Laws 1953, c. 34.

Administrative Director of the Courts in Puerto Rico,⁹³ as well as in the reports for New Jersey⁹⁴ and for the federal courts.⁹⁵ In the latter, for example, the increase in civil cases commenced in the district courts is 9.5 per cent over the 1952 figure, bringing to 66 per cent the cumulative increase since 1941.⁹⁶

A nation-wide survey of the status of trial court calendars in 1953 shows that the overall average time interval from "at issue" to trial of civil cases in the ninety-seven metropolitan courts covered was 11.5 months for jury cases and 5.7 months for nonjury cases.⁹⁷ The greatest delays reported were in New York City, Worcester County in Massachusetts, and Cook County, Illinois. In the Supreme Court of Kings County (Brooklyn), the average figure was fifty-three months, and in New York County (Manhattan), forty-three months.

Efforts and proposals to solve the problem have been many and varied. The need for additional judges has been stressed for the federal courts,⁹⁸ and met in California by legislative authorization of thirty-three additional superior court judgeships.⁹⁹ A New York constitutional amendment, approved by the voters in November 1953, permits judges within New York City to be assigned to courts where needed.¹⁰⁰ Presiding Justice Peck of the New York Appellate Division has reported on other steps taken to alleviate delays, including the preference rule, pre-trial conferences, and the use of independent medical reports.¹⁰¹ Other suggestions have been advanced, such as elimination of delaying tactics,¹⁰² and the use of referees and mediation of tort cases.¹⁰³ Judge Holtzoff of the District Court for the District of Columbia has described procedural improvements and the responsibilities of judge and counsel to expedite trials.¹⁰⁴

Elsewhere, the congestion problems in Connecticut¹⁰⁵ and Massachusetts¹⁰⁶ have been analyzed and proposals offered for their solution,

⁹³ Informe Anual del Director Administrativo de los Tribunales 1952-1953.

⁹⁴ See Vanderbilt, *The Record of the New Jersey Courts in the Fourth Year under the New Constitution*, 7 Rutgers L. Rev. 317 (1953).

⁹⁵ See Annual Report of the Director of the Administrative Office of The United States Courts (1953).

⁹⁶ *Id.* at 3. And see Report of the Proceedings of the Regular Annual Meeting of the Judicial Conference of the United States 4 (1953).

⁹⁷ Inst. of Jud. Admin., *Calendar Status Study—1953* (June 30, 1953).

⁹⁸ See note 79 *supra*.

⁹⁹ Cal. Stat. 1953, cc. 255, 1817-29.

¹⁰⁰ N.Y. Const. Art. VI, as amended Nov. 3, 1953 (1953 N.Y. Senate Int. 101).

¹⁰¹ Peck, *Report on Justice*, 25 N.Y. State Bar Bull. 107 (1953).

¹⁰² Nims, *The Cost of Justice: A New Approach*, 39 A.B.A.J. 455 (1953).

¹⁰³ McGrath, *The President's Page*, 4 Brooklyn Barrister 182 (1953).

¹⁰⁴ Holtzoff, *How Courtroom Procedure May Be Expedited*, 14 F.R.D. 323 (1953).

¹⁰⁵ Baldwin, *How Can We Expedite the Business of the Courts?*, 27 Conn. B.J. 1 (1953).

¹⁰⁶ Dimond, *Congestion in the Superior Court Since Its Creation in 1859 and Proposals for Relief*, 38 Mass. L.Q. 95 (June, 1953).

and a Colorado Supreme Court justice has reportedly announced steps to reduce congestion in the Denver courts, including the temporary suspension of pre-trial conferences "for present expediency."¹⁰⁷ In Missouri, the flexible provisions of the 1945 Constitution permitting "temporary transfers of judicial personnel from one court to another as the administration of justice requires"¹⁰⁸ have been availed of to help cope with the crowded docket conditions in the Circuit Court of Jackson County.¹⁰⁹

Pre-Trial.—Increase in the use of pre-trial procedures, despite possible contrary indications in Denver, may provide one step toward solution of the problem of court congestion and trial delays. The Georgia Legislature, in an act patterned in part on the pre-trial provisions of the Federal Rules of Civil Procedure, has authorized its use in superior court civil cases there,¹¹⁰ and New York has extended pre-trial both in the city court of New York and in the supreme court in additional counties.¹¹¹ Adoption of pre-trial procedures for the Superior Court of Rhode Island has also been reported to be heavily favored by the members of the bar in that state.¹¹²

Reviews of successful operations of pre-trial systems in Texas¹¹³ and Ohio¹¹⁴ add weight to the growing body of supporting data. Also of value are recent surveys of pre-trial conferences and procedure in Kentucky,¹¹⁵ and Judge Murrah's pamphlet, published by the Administrative Office of the United States Courts for distribution to newly appointed judges of the federal district courts.¹¹⁶

Rule-Making and Procedural Rules.—The movement for transfer of the procedural rule-making power from legislatures to the courts is slowly gaining ground. Thus, a 1953 statute in Connecticut yields to the judges the authority to adopt rules regulating pleading, practice and procedure in all courts of the state, such rules when adopted to be submitted to the General Assembly, which has power to disapprove them.¹¹⁷ Similar legislation has been urged by the Judicial Council in Vermont,¹¹⁸

¹⁰⁷ Jones, From the State Capitals (Oct. 31, 1953).

¹⁰⁸ Mo. Const. 1945, Art. V, § 6. See also § 16: "Any circuit judge may sit in any other circuit at the request of a judge thereof."

¹⁰⁹ Ellison, Temporary Transfers of Missouri Judges, 9 J. Mo. Bar Ass'n 25 (1953).

¹¹⁰ Ga. Laws 1953, No. 319.

¹¹¹ 19 N.Y. Jud. Council Rep. 28 (1953).

¹¹² Jones, From the State Capitals (Aug. 15, 1953).

¹¹³ Hughes, Pre-Trial Progress in Texas, 16 Texas B.J. 131 (1953).

¹¹⁴ Pre-Trial Operation Termed Successful, 24 Cleveland Bar Ass'n J. 181 (1953).

And see Norris, Results of Pre-Trial Procedure in Domestic Relations Court, 24 id. at 105.

¹¹⁵ Dow, The Pre-Trial Conference, 41 Ky. L.J. 363 (1953); Patterson, Pre-Trial Procedure in Practice, 41 id. at 383.

¹¹⁶ Murrah, Pre-Trial Procedure—A Statement of Its Essentials (1953).

¹¹⁷ Conn. Pub. Acts 1953, No. 214. The act continues in force existing statutes on the subject until modified or repealed by the proposed new rules.

¹¹⁸ Vt. Jud. Council, Fourth Biennial Report 9 (1953).

and a committee of the Missouri Bar has recommended the enactment of a constitutional amendment to vest full rule-making power in the Supreme Court of Missouri, to cover all procedural law, including the law of evidence, and oral examination of witnesses.¹¹⁹ Meanwhile, under its existing and more limited authority, the Missouri Supreme Court has formulated proposed new rules of civil procedure to supersede procedural provisions in the statutes and present rules.¹²⁰

Kentucky's new rules of civil procedure, adopting substantial portions of the federal rules, became effective July 1, 1953,¹²¹ and New Jersey has undertaken and completed the first overall revision of its rules since their original adoption in 1948.¹²² The Federal Rules of Civil Procedure, it has been announced, will be again re-examined by the Advisory Committee with a view toward possible revision or expansion in the light of developments since the last major restudy that resulted in the amendments of 1946.¹²³

Jurors and Jury Selection.—Despite the doubting view of some commentators as to the future of jury trials in civil cases,¹²⁴ there are evidences of effort to preserve and strengthen juries as an institution. Against the oracles of obsolescence, there are those who view the right of trial by jury, civil or criminal, as an essential safeguard of justice.¹²⁵ And there are those, also, whose interest urges them to probe deeper into the psychological workings of a system so fundamentally established in Anglo-American tradition.¹²⁶

Improved methods of jury selection are anticipated in New Jersey through the recent transfer from the governor to the supreme court of the authority to appoint and remove jury commissioners.¹²⁷ In California, suggested model rules for the testing and selection of prospective jurors would accomplish desirable advancements in the caliber of those ultimately chosen for jury duty.¹²⁸ But the discouraging obstacles of low pay, exclusion of women in some states, and lack of public enthusiasm for jury service remain to be surmounted. It is true that states from time to time take cognizance of, and seek to improve, the low per

¹¹⁹ Report of Evidence Code Committee, 9 J. Mo. Bar 143 (1953).

¹²⁰ Comment, The Proposed Rules of Civil Procedure for Missouri, 18 Mo. L. Rev. 280 (1953).

¹²¹ Judicial Administration Legislative Summary, 36 J. Am. Jud. Soc'y 148, 150 (1953).

¹²² New Jersey Court Rules, 1953 Revision.

¹²³ The United States Supreme Court Advisory Committee on Rules for Civil Procedure, 39 A.B.A.J. 754 (1953).

¹²⁴ See, e.g., Peck, Report on Justice, 25 N.Y. State Bar Bull. 107 (1953).

¹²⁵ See Bok, The Jury System in America, 287 Annals 92 (1953).

¹²⁶ Meltzer, A Projected Study of the Jury as a Working Institution, 287 Annals 97 (1953).

¹²⁷ N.J. Laws 1953, c. 240.

¹²⁸ Comment, Jury Selection in California, 5 Stan. L. Rev. 247 (1953).

diem and mileage allowances for jurors—witness recent legislative action in Arkansas,¹²⁹ Idaho,¹³⁰ Iowa,¹³¹ Minnesota,¹³² and New Hampshire.¹³³ It is true that the possibility of women jurors in still-resistant states moves one step nearer through proposed constitutional amendments in Texas¹³⁴ and West Virginia.¹³⁵ But a basic approach through stimulation of citizen awareness of the privileges and duties of jury service, such as the educational program undertaken in the high schools of the District of Columbia,¹³⁶ needs wider adoption, if the values of a system, otherwise doomed to possible desuetude, are to be preserved and vitalized.

Traffic Courts and Justices of the Peace.—Efforts to enhance the status of, as well as to establish minimum qualifications for, justices of the peace have met with varied success. Thus, a legislative committee in New York has recommended that minimum qualifications be established for the office of justice of the peace, and that the title of the office be changed "in order to get away from certain derogatory implications attached to the name 'Justice of the Peace.'"¹³⁷ The reorganization plan in California, featuring the consolidation of justice courts and their integration into the judicial system, includes a requirement that no one shall be eligible to become a judge of such court unless he "has passed a qualifying examination under regulations prescribed by the Judicial Council."¹³⁸ The examinations, which are written and which relate to the jurisdiction, practice and procedure of justice courts, and the duties of judges, are administered by local county committees.¹³⁹ In Pennsylvania, on the other hand, proposed requirements for the instruction and standard examination of all justices of the peace, other than those who have been admitted to the bar, failed to secure legislative approval.¹⁴⁰ While the Arkansas Legislature paved the way for possible reduction in the number of that state's justices of the peace, by approving a consti-

¹²⁹ Ark. Acts 1953, No. 46.

¹³⁰ Idaho Laws 1953, c. 88.

¹³¹ Iowa Code § 607.5 (1950), amended by Iowa Laws 1953, c. 248.

¹³² Minn. Laws 1953, c. 478. The act increased jurors' pay, but reduced mileage allowances.

¹³³ N.H. Laws 1953, c. 18.

¹³⁴ 1953 Texas House Joint Res. No. 16.

¹³⁵ 1953 W. Va. House Joint Res. No. 3.

¹³⁶ See Pub. Schools of Dist. Col., A Resource Unit on The Jury System and American Courts (1953).

¹³⁷ Shultz Committee's Preliminary Report, 13 Justice Court Topics 1, 2, 3 (May 1953).

¹³⁸ Cal. Stat. 1949, c. 1510, § 13. The act exempts incumbent judges for the duration of their present and subsequent consecutive terms of office.

¹³⁹ Report on the Reorganization of the Lower Courts, Jud. Council of Calif., 14th Biennial Report 13, 22 (1953).

¹⁴⁰ 1953 Pa. House Bill No. 1458.

tutional amendment to be submitted to the voters in 1954,¹⁴¹ the California Legislature failed to approve a measure that would supplement the integration of justice courts by bringing the judges thereof into the state's judicial retirement system.¹⁴²

A nation-wide survey presents for the first time a comprehensive and detailed picture of traffic law enforcement in the forty-eight states.¹⁴³ The report discusses each of the sixteen resolutions adopted in 1951 by the Conference of Chief Justices, and portrays by means of maps the extent of acceptance by the states of each of the resolutions. Integration of traffic courts into the state's judicial system, the provision of suitable courtrooms, the separation of traffic cases from other criminal business, the elimination of traffic ticket "fixing," and the nonpartisan selection of local judges are among the topics covered by the resolutions and toward which the states are urged to strive. If the goal is to be attained, constant, vigorous, and widespread public support is essential. Also essential is an up-to-date appraisal in each state of the local needs and problems of the administration of justice in traffic cases.¹⁴⁴

Conclusion.—Ultimate success in improving the judicial system rests, at base, on an understanding awareness of present needs and shortcomings. The leadership in insuring that awareness and in alerting the public to informed action rests, in turn, on the entire legal profession and its constituent lawyers and judges. That such broad leadership has too often been reluctant in forthcoming is emphasized in an address by Chief Justice Vanderbilt of New Jersey delivered at Northwestern University School of Law:

Where thoroughgoing judicial reform has been achieved, as in England and in New Jersey, it has come, in spite of the bench and the bar generally, through the efforts of laymen led by a few brave lawyers. This is the darkest and most indelible spot on the escutcheon of our otherwise great profession. Perhaps (I wish I could be more confident) the great popular discontent that presently confronts government at all levels—national, state, and local—may inspire the bench and bar everywhere to undertake the task that is emphatically theirs, not only as a matter of professional duty but also as a matter of self-preservation, despite the inconvenience it will temporarily cause them until they become accustomed to the improved judicial system that they know the public is entitled to.¹⁴⁵

¹⁴¹ 1953 Ark. House Joint Res. No. 5.

¹⁴² 1953 Calif. Assembly Bill No. 763.

¹⁴³ Vanderbilt, Traffic Law Enforcement and the Sixteen Resolutions of the Chief Justices and the Governors (July 1953).

¹⁴⁴ See, for example, Report on Survey of the Administration of Justice in Traffic Cases, Jud. Council of Calif., 14th Biennial Report 29 (1953).

¹⁴⁵ Vanderbilt, The Essentials of a Sound Judicial System, 48 N.U.L. Rev. 1, 2 (1953).

PART SIX

Legal Bibliography

LEGAL BIBLIOGRAPHY

JULIUS J. MARKE

JUSTICE HOLMES once observed that "all books are dead in 25 years, but luckily the public does not always find it out."¹ Certainly, in the field of law there is no reason for this reproach, for the discriminating lawyer, alert to the many bibliographical references available in periodical literature, as well as the comprehensive check lists currently being published, can easily orient himself to the literature of his subject. It will be the purpose of this article to comment on bibliographical guides and periodicals of recent vintage and to make sundry apposite observations on the subject which may be of interest to the legal researcher.

I

RECENT BOOKS

Effective Legal Research.—Miles O. Price, law librarian of Columbia University, is generally recognized as the dean of law librarians in this country. His summer course on legal research and law library administration is presently a *sine qua non* to success in the field for the younger generation of aspiring law librarians. With the able assistance of his associate librarian, Mr. Bitner, he has written a book which reflects his great understanding of legal research tools and methodology.² The purpose of the book, the authors state in the preface, is to show "that when a problem arises which should be solvable by a law book, that book exists, and that it functions along well-defined lines which are herein described."³ Bibliographical appendices of Anglo-American law reports and periodicals, as well as abbreviations, are the most current and complete that are available today.

As a reference tool for law librarians, lawyers, and students with

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¹ 1 Holmes-Pollock Letters 195 (Howe ed. 1941).

² M. O. Price and H. Bitner, *Effective Legal Research, A Practical Manual of Law Books and Their Use* (New York: Prentice-Hall Inc., 1953, pp. 633).

³ *Id.* at ix.

legal problems, for the purpose indicated, *Effective Legal Research* is without peer. True, there are occasional typographical and editorial errors, but it would be picayune to stress them, considering the overall importance of this legal research guide. Subsequent editions will eliminate them, for this book is so impressive in its wealth of information that it should run into many editions. There is one other aspect of the book that bears comment. It is not only designed to help in finding the law, but also to be a medium for teaching legal research in law school. Whether legal research can be taught by dependence primarily on a book has bothered the writer for many years. His own experience causes him to believe otherwise. Students require much more than the written or spoken word. The laboratory method has appeared to be the best solution. It will be interesting to ascertain the effectiveness of the Price and Bitner book as a teaching tool.

Legal Bibliography and Legal Research.—Miss Notz, who is a professorial lecturer at Washington College of Law of American University, has revised the third edition of her research manual.⁴ Research procedures are stressed as in previous editions and the materials of legal research are described. A book on problems accompanies the book to provide laboratory work for students.

The Libraries of the Legal Profession.—In the latest report of the Survey of the Legal Profession, sponsored by the American Bar Association,⁵ Professor Roalfe, law librarian of Northwestern University, sets forth his findings and conclusions based on his personal inspection of 94 law libraries and correspondence with hundreds of others. The present state of book collections, quarters, furniture and equipment, personnel services, types of services rendered and public relations are described with accompanying recommendations for improvement. The Survey covers law office and company libraries, county, state and federal court libraries, federal department and bar association libraries. Professor Roalfe discusses their special problems with the understanding of an expert. Unfortunately, law school libraries were not included, a most serious gap in the interpretation of statistics, due to their projected appearance in another report of the Survey planned for future distribution.

Professor Roalfe cautions that his statistics are subject to limited interpretation. He states:

A closely related problem is that of insufficient data. In some instances this available data represents such a limited number of libraries that it can hardly be regarded as a representative sample. Nevertheless, it has

⁴ Rebecca L. Notz, *Legal Bibliography and Legal Research* (3d ed.; Chicago: Callaghan, 1952, pp. 396).

⁵ William R. Roalfe, *The Libraries of the Legal Profession* (St. Paul: West Publishing Co., 1953, pp. 471):

seemed desirable to make even such data available however meager it may be. If it is inconclusive or the result suggested is atypical, this may in fact provoke a further inquiry, a result which is certainly to be desired. This is clearly a pioneer study and this fact should be taken into account.⁶

An appendix features a bibliography of 150 Survey reports prepared by Reginald Heber Smith, director of the Survey.

Research in the Law Series.—A new series of research guides in the literature of the law, entitled *Research in the Law Series*, was begun this year. Its purpose is to supplement the general legal bibliographies, such as Price and Bitner, by treating the legal literature of a jurisdiction in intimate detail and explaining the peculiarities of legal research therein. It is not practical for the general texts on legal research to cover the various jurisdictions in this manner. The publisher of the series also plans books of this type on legal subjects which lend themselves to such treatment because of the special problems of research in fields such as administrative law, military law, etc.

The first book to be published in the *Research in the Law Series* was written by the law librarians of the University of Pennsylvania and Temple University.⁷ In following the limitation imposed by the series, the authors have comprehensively treated the legal materials of Pennsylvania, leaving to the general works on legal bibliography the background material of a broader scope. Covered are statutory law, court reports, digests, citators, court rules, administrative law, practitioners' books and miscellaneous legal publications. Not only do the authors describe these Pennsylvania materials for ready reference but, equally important, explain the methodology involved in their use. The result is an authoritative reference guide to the legal materials of Pennsylvania which should also be useful to practitioners as a handy desk book.

Annotated Catalogue of the Law Collection at New York University.—Writing in the *Law Library Journal*, the law librarian of Emory University lamented that the small law school library has great difficulty in building up the library's collection in the basic fields of instruction for "there is no 'Standard Catalog for Law Librarians' and the diligent librarian must use all the varied tools he can manipulate to dig out the bibliography of a specialized field."⁸ The publication of the first classified and annotated catalogue of Anglo-American law books of an important law school library, compiled and edited by its

⁶ Id. at 7-8.

⁷ C. C. Moreland and E. C. Surrency, *Research in Pennsylvania Law* (New York: Oceana Publications, 1953, pp. 91).

⁸ 44 Law Lib. J. 78, 79 (1951).

law librarian, may be the solution to this problem.⁹ A reviewer has described it as more than a catalogue of the law collection at New York University.

It is, in fact, a selected and annotated bibliography of the whole field of the law, with special emphasis on Anglo-American law. The materials are arranged under eleven broad headings, such as sources of the law, history of law and its institutions, comparative law, with subdivisions where necessary. Within the section or subdivision the entries are listed alphabetically by author . . . followed by title, place and date of publication, pagination, and in almost every case, a short annotation. These annotations are the real meat of the book. They are almost always excerpts culled by the compiler from reviews and treatises by recognized authorities. They give the user some description of the book and an indication of its place in the literature of law.¹⁰

The *Annotated Catalogue* contains some 45,000 entries and 25,000 annotations. It also features comprehensive subject and author indexes which facilitate reference to the classified arrangement of materials.

The *Annotated Catalogue* has already been acknowledged as a valuable source of information for book selection. It is interesting to note that at a round table discussion on "The Law Library's Collection" on December 29, 1953, at the Annual Meeting of the American Association of Law Schools, one of the speakers stated that of the approximately 5,000 books recommended by law professors for use in instruction in law schools, all but two were listed and annotated in this catalogue.

II

CURRENT BIBLIOGRAPHIES

In response to the appeal of President Edwin M. Otterbourg of the New York County Lawyers Association "to seek a modernization of the law of libel and slander in order to provide protection for individuals and groups against the technique of 'smear' attacks in vogue today," Lawrence H. Schmehl, librarian of the Association, prepared an up-to-date bibliography to cover the entire range of the subject.¹¹ Included in this excellent listing are books, articles, editorials and notes, cases, comments and annotations.

Dr. Marvin Bressler of the Department of Sociology of the University of Pennsylvania is the editor and compiler of a current *Criminological Research Bulletin*.¹² This is the second edition of the New

⁹ A Catalogue of the Law Collection at New York University with Selected Annotations, Compiled and Edited by J. J. Marke (New York: The Law Center of New York University, 1953, pp. 1372).

¹⁰ 102 U. of Pa. L. Rev. 155 (1953).

¹¹ 10 N.Y. County Bar Bull. 144-48 (1953).

¹² 44 J. Crim. L. & Criminology 185-203 (1953).

Series, the first number of which was edited by Professor Otto Pollak.¹³ As described by Dr. Bressler, the *Bulletin* is "primarily a survey of studies in criminology which are in progress, recently completed and/or in the process of publication. . . ." It was compiled because "the increasing number of research projects which have been performed in criminology in recent years necessitates the existence of some accessible centralized research census." The *Bulletin* reports those studies which were begun between October 1949 and October 1952, and is based on the returns to 1300 questionnaires sent to scholars in the field. Materials are grouped under Criminal Statistics; Causation; Police Organization and Administration; Science of Detection; Law, Procedure and Administration of Justice; Treatment: (A) Institutional, (B) Probation & Parole, (C) Other; Effectiveness of Treatment; and Miscellaneous. Recently completed projects available in book form or readily accessible literature are not listed, although Dr. Bressler has included a number of studies published by administrative agencies, independent commissions, etc., or published in sources not easily ascertainable.

The enforcement abroad of American money judgments and arbitration awards is presently being studied by the Committee on Foreign Law of the Association of the Bar of the City of New York. At the outset it is the committee's purpose to limit its study to the British Commonwealth of Nations and to Latin-American countries. Based thereon, it plans to recommend changes in the law of New York and to suggest the negotiation of treaties with certain countries—if such course be warranted by the findings. The committee also plans to call upon international organizations, such as the International Law Association, the International Bar Association, etc., to co-operate with it "so that remedial measures, if deemed desirable, may be promoted to facilitate the enforcement of American judgments abroad." In addition, the committee will arrange for members of the bar to be made aware of the difficulties and snares of such enforcement and to recommend the inclusion of certain necessary clauses in contracts.

Phanor J. Eder and Martin Domke of the committee, as an aid to research activities, have compiled a bibliography of the subject, which well bears attention.¹⁴ The researcher interested in comparative law should find it particularly useful. In listing their entries, the compilers add that the standard works abroad on private international law (conflicts of law) include the subject of foreign judgments, but only those which deal with it on a comparative basis or otherwise were included in the listing.

The lawyer interested in the problems arising under the Contract

¹³ 40 J. Crim. L. & Criminology 701-28 (1950).

¹⁴ 8 Record 308-10 (1953).

Settlement Act of 1944 and related legislation can thank a former Solicitor of the Post Office Department, Frank J. Delaney, Esq., for a listing of selected reference material on the subject.¹⁵ Materials are classified under the following subject headings: I. Laws, Executive Orders and Regulations; II. Selected Congressional Hearings and Reports; III. Unofficial Publications Annotating Laws, Regulations, etc.; IV. Books and Pamphlets; V. United States Government Periodicals; VI. Periodicals. It is indeed a valuable contribution to the legislative history and interpretative materials of the Act.

Are you interested in trust and probate literature digested and classified for your ready reference? Then read the October 1953 issue of *Trusts and Estates*.¹⁶ It contains the proceedings of the Probate and Trust Divisions of the American Bar Association and Professor Arad M. Riggs of New York University School of Law, committee chairman, contributes a most worthwhile column entitled "Trust and Probate Literature, 1952-53." Under such subject headings as Business Interests, Charities, Decedent Estates, Estate Planning, Gifts, Perpetuities, Powers of Appointment, Taxes, Trusts, Wills, and Book Reviews, the reader can quickly ascertain, by reason of the well-written descriptive annotations, the contents and value of the prolific periodical literature in the field. The department "Trust and Probate Literature" appears to be a feature of the October issue of *Trusts and Estates*. In the October 1952 issue, the committee chairman was Henry H. Benjamin and he contributed the descriptive analysis of the literature of 1951-52.¹⁷

Professor Thomas S. Checkley, law librarian of the University of Pittsburgh, has written an article and compiled a valuable listing of materials on bill drafting.¹⁸ Entitled "A Practical Bibliography on Bill-Drafting," it is addressed to the young lawyer. Professor Charles B. Nutting states as his opinion that Professor Checkley's suggestions "should be of considerable value to those who cannot obtain formal instruction in the preparation of legislation."¹⁹

Researchers interested in ascertaining exactly what was published in the form of Tentative Drafts of the Restatements of Law of the American Law Institute from its early beginnings in 1923 to October 1950 owe a debt of gratitude to Erwin C. Surrency, law librarian of Temple University. Checking the holdings of the University of Pennsylvania Law School Library, which has kept an official file for the American Law Institute, he has compiled and published the first almost

¹⁵ 13 Fed. B.J. 234-39 (1953).

¹⁶ 92 Trusts & Estates 793-98 (1953).

¹⁷ 91 Trusts & Estates 776-82 (1952).

¹⁸ 39 A.B.A.J. 600-02 (1953).

¹⁹ Id. at 600.

complete bibliography of these drafts.²⁰ Mr. Surrency plans to issue supplements for the new drafts which have appeared after October 1950 on the Uniform Commercial Code and the federal income tax statute.²¹

The Preliminary Drafts of the Restatements of Law are also important to the legal researcher because they contain the form of the Restatement as recommended by the Reporters to the Council of Advisers of the American Law Institute. After approval by the Council of the American Law Institute, Preliminary Drafts are submitted to the full meeting of the Institute in the form of Tentative Drafts. A checklist of Preliminary Drafts of the Restatement has also been compiled by Mr. Surrency and can be referred to in the *Law Library Journal*.²²

The student of comparative law will find in the *Law Library Journal* a worthwhile bibliographical guide to civil and commercial codes.²³ Consisting of a listing of both civil and commercial codes of thirty-one civil-law countries, the purpose of the bibliography is to show how widespread these codes have become since the promulgation of the French Civil Code at the beginning of the nineteenth century. It covers the countries of Europe and Central and South America. In the selection of material Miss McLaury was influenced by the political history of the country.

The publications of the sections of the American Bar Association have great usefulness, yet are seldom cited or referred to because they are so little known and often inaccessible. It is rare to find a library with a complete collection, or even a worthwhile one, and library catalogue records for those publications are similarly inadequate. Erwin Surrency, law librarian of Temple University, once again has come to the aid of the researcher compiling a bibliography entitled "A Checklist of the Publications of the Sections of the American Bar Association."²⁴ The checklist reflects the holdings of the law libraries of Columbia and Temple Universities and the University of Pennsylvania. The reports of individual committees are omitted, except in cases where they are the only publications of the sections or contain enough information to warrant inclusion in the listing. Miscellaneous publications are omitted as well.

²⁰ 44 Law Lib. J. 11-25 (1951).

²¹ The following checklists compiled earlier should also be noted: M. Long, A Bibliographical Check List of Publications of the American Law Institute: Including a List of Pamphlets and Articles About the Work, 32 Law Lib. J. 159-200 (1939); Long, Supplement, 1939-1947, 41 Law Lib. J. 50-62 (1949).

²² 45 Law Lib. J. 26-38, 96-111 (1952).

²³ Helen McLaury, 44 Law Lib. J. 83-93 (1951).

²⁴ 44 Law Lib. J. 322-33 (1951); 46 Law Lib. J. 53-59 (1953).

With the purpose of supplying more current information on recent legal publications than is possible in the *Law Library Journal*, the Committee on Special Publications of the American Association of Law Libraries is now issuing periodically a mimeographed list of current publications called "Current Publications in Legal and Related Fields."²⁵ It lists new titles, with prices, under a classified and author arrangement and also features a section on supplements and continuations. Subscription cost is \$3.75 a year in the United States and Canada, \$4.25 elsewhere. Editorial correspondence should be addressed to Miss Dorothy Scarborough, Northwestern University Law School Library, Chicago, Illinois.

The University of Chicago Law School Library has issued three bibliographies in mimeograph form. The first is entitled "Articles on Legal and Related Problems in Periodicals Not Covered by the Index to Legal Periodicals." The others are on "Cartels and Monopolies," and "Civil Liberties."

A comprehensive bibliography on oil and gas was published in 1953, compiled by the law librarian of Louisiana State University.²⁶

The Anti-Defamation League of B'nai B'rith of the American Jewish Committee compiled two bibliographies on immigration, dated October 23, 1953. One of the bibliographies consists of five pages and is entitled "Immigration to the United States. A Selected Bibliography of Recent Publications Intended as Supplementary Reading to Accompany the Text of the Immigration and Nationality Act." It is quite detailed and includes references to law review articles, minutes and reports of congressional hearings, and books, pamphlets and memoranda. The second, consisting of four pages and entitled "A Selected Bibliography," is intended for more popular use by college students, adult education groups and similar nonprofessionals.²⁷

²⁵ Published monthly except June, July and August.

²⁶ Kate Wallach, *List of Materials on Oil and Gas in the Louisiana State University Libraries* (Baton Rouge, La. State Univ., 1953, pp. 68).

²⁷ Other bibliographies of interest to the legal profession are:

C. E. Coe, *Bibliography of Accounting and Tax Articles* (Inglewood, Calif.: The author, 1953, pp. 287).

A. M. Hannay, D. W. Gooch, and M. L. Gould, *Land Ownership: A Bibliography of Selected References* (Washington: Govt. Print. Off., 1953, pp. 293) (United States Dep't of Agriculture, Bibliographical Bull. No. 22).

W. P. Leidy, *Popular Guide to Government Publications* (New York: Col. Univ. Press, 1953, pp. 296).

H. S. Martin, *A Selected Bibliography on the Classification of Law* (Columbus: Ohio State Univ. College of Law Lib., 1952, paper).

C. F. O'Brien, *A Selected Bibliography on State Constitution Revision with Particular Reference to Ohio* (Columbus: Ohio State Univ. College of Law, 1952, paper).

Princeton University, Industrial Relations Section: *Outstanding Books on Industrial Relations*, 1952 (Princeton: The author, 1953, pp. 4).

III

BIBLIOGRAPHICAL REFERENCES IN PERIODICAL LITERATURE

The Record of the Association of the Bar of the City of New York, published nine times a year, features with each issue a listing of material on specific subjects, compiled by its librarian, Sidney B. Hill. Entitled a "Checklist," under the department of "The Library," it can be of real help to the researcher interested in the subject covered. The subjects are usually well chosen in light of current events affecting lawyers. Here are some of the checklists, chosen at random, to be found in recent issues: Presidential Powers under the Constitution; Legal Aspects of the Use of Atomic Energy by Private Industry; Professional Fees; Legal Aid; Zoning and City Planning.

An excellent bibliographical guide for the lawyer, edited by Professor Arthur John Keeffe, visiting professor of law at New York University, appears monthly in the *American Bar Association Journal*. The column is entitled "Practicing Lawyer's Guide to the Current Law Magazines." Under specific subject headings, such as Anti-trust, Bankruptcy, Evidence, and Military Justice, the reader is given a concise synopsis of the article digested usually with some accompanying apt comment of the editor. The editor's style is really refreshing. Note the following in reference to an article on military justice by Professor Aycock: "If you want an accurate digest and topical analysis of the decisions sans critical or partisan analysis, this is the ticket. It is a Corpus Juris of COMA."²⁸

The tax specialist should never miss the listing of "Selected Tax Reading" featured in the quarterly issues of the *Tax Law Review*, published by New York University School of Law. Compiled by Sydney Perau and Irving Schreiber, it calls attention to everything of merit written on the subject during the period covered. It is an excellent checklist of books, pamphlets and periodicals to be considered by the tax consultant.

Jean Ashman and Dorothy Scarborough are editors of a selected legal bibliography entitled "Current Publications." Based on the listings of law libraries, particularly those of Duke and Northwestern Universities, and other sources of information, it appears periodically

Special Libraries Association, *A Source List of Selected Labor Statistics* (2d rev. ed.; New York: The author, 1953, pp. 123).

United States Railroad Retirement Board, Office of Director of Research, *Bibliography of the Railroad Retirement Board with Supplementary Bibliography on Social Security in the United States and Foreign Countries* (Chicago: The author, 1952, paper).

Western Governmental Research Association, *Inventory of Public Affairs and Social Science Research in the Western States, 1951 and 1952*, compiled by P. Ford and S. Scott (Berkeley: Univ. of Calif., 1953, pp. 113).

²⁸ 39 A.B.A.J. 927 (1953).

in the *Law Library Journal*. It is a classified listing of materials employing the subject headings used in the American and Decennial Digests. Its purpose is to be a permanent source of information on current publications of interest to law libraries and legal researchers.

The Industrial and Labor Relations Review, issued quarterly by the New York State School of Industrial and Labor Relations at Cornell University, publishes a worthwhile and comprehensive bibliography in each issue entitled "Recent Publications." Compiled by J. Gormley Miller, the librarian, and I. Bradford Shaw, it lists materials under subject headings peculiar to all the intimate facets of labor relations. It is also important to note that it indexes articles in many nonlegal publications which are of value to the labor specialists. Covered also are government publications, small pamphlets, case studies, state publications, books, etc.

The Bulletin of the Copyright Society of the United States, published six times a year at the Law Center of New York University, contains excellent bibliographical information on copyright law published in the United States and in foreign countries. Articles on copyright appearing in other law reviews and trade magazines are digested as well.

The American Journal of Comparative Law, published quarterly by the newly created American Association for the Comparative Study of Law with editorial offices at the University of Michigan, has several unusual departments which should be of interest to the student of comparative law. Featured under the heading "Digest of Foreign Law Cases" are digests of cases currently decided in the federal and state courts of the United States pertaining to the law of foreign countries.²⁹ Its book review section reviews books published in many foreign countries on the subject and is recommended strongly to those interested in the field.

The Journal of Air Law and Commerce, published quarterly by Northwestern University School of Law and Commerce, features in each issue a bibliography of current books, pamphlets and periodical articles on aviation. Included under periodical listings can be found references to articles in foreign periodicals. A brief annotation describes the contents or import of the foreign material listed.³⁰ This periodical is another valuable source for comparative law.

An old stand-by which is often neglected by researchers is the

²⁹ E.g., "Conway v. Hamilton Overseas Contracting Corp., 120 N.Y.S.2d 672 ([Sup. Ct.] 1953): application of Turkish law on liability for negligence causing death of employee," 2 Am. J. Comp. L. 543 (1953).

³⁰ E.g., "Rechtliche Probleme des Weltraumflugs, con Alex Meyer. Zeitschrift für Luftrecht, No. 1, 1953; 2:31-43 (Discussion of the legal aspects of space travel)," 20 J. Air L. & Com. 126 (1953).

Legal Periodical Digest, published by Commerce Clearing House. It reports digests of selected leading articles published in current American legal periodicals, classifying them under subject headings. For example, all articles on corporation law will be found together. A valuable feature of this service is its index which simplifies the location of all digests by entering them under title, author, subject and citation. The format of this reference tool is characteristic of the typical CCH looseleaf services. Articles appearing in the *Canadian Bar Review*, *Law Quarterly Review*, *Scottish Law Review*, *University of Toronto Law Journal*, all important periodicals often containing studies of interest to American legal scholars, are also digested and indexed in the *Legal Periodical Digest*. The digests of the articles are often quite complete, giving a well-rounded analysis of their contents.

Another old reference tool that warrants current comment for bibliographical guidance is the *Index to Legal Periodicals*. Under the subject heading "Bibliography" it indexes checklists and bibliographical articles on specific subjects.

Abstracts of significant current pamphlet and periodical materials in the field of industrial and labor relations are issued monthly by the Library of the New York School of Industrial and Labor Relations at Cornell University under the title "Industrial and Labor Relations Abstracts and Annotations." The material noted is usually chosen for current significance and applicability to the varied aspects of the broad general field of industrial and labor relations. In addition to "Abstracts and Annotations," the New York State School of Industrial and Labor Relations publishes a series of bibliographical bulletins.

IV

MICROFILM EDITION OF EARLY LEGISLATIVE, JUDICIAL AND EXECUTIVE RECORDS

It is really difficult to comprehend, but imagine the thousands of linear feet required to shelve all of the earlier legislative, judicial and executive records of the forty-eight states and their various territorial and colonial predecessors. Try to visualize its equivalent of almost 2,500,000 pages or approximately 8,300 books of 300 pages each. Having arrived at an evaluation of the space problem, what would be your reaction to noting that it is now possible to obtain the same material by reference to microfilms occupying no more than twenty-six cubic feet of space! Add to this outstanding achievement the realization that all these records formerly dispersed in hundreds of libraries and archives throughout the country can now be acquired in one place, and you have some conception of the magnitude of this accomplishment.

For all this yeoman work, we are indebted to the Library of Congress and the University of North Carolina which undertook jointly in 1941 to microfilm all of these records. The completed project consists of 1,700 reels of microfilm of approximately 100 feet each in length, and comprises as complete a collection as is known today of all legislative records, statutory law, constitutional records, administrative records, executive records and court records from the earliest origins in this country to approximately 1850.

The researcher or prospective purchaser interested in ascertaining a listing of the material so microfilmed may refer to *A Guide to the Microfilm Collection of Early State Records*, an 800-page catalogue published by the Library of Congress. The *Guide* will also be of value as a checklist because of its complete listings. The Photoduplication Service of the Library of Congress will accept orders for positive copies of any reel of the film at \$15.00 per 100-foot reel, or \$22,400 for the entire collection.

V

MICROCARDS

The use of microcard editions of books has increased with measured pace since its introduction about four years ago.³¹ Considering the very many advantages accruing from its use, it is indeed unfortunate that it has not been more generally adopted as a medium of communication. Researchers in the field of science have shown much more initiative than our colleagues in the law profession in taking advantage of this development. They recognize its potentialities and have arranged for long lists of scientific literature to be reproduced on microcards. Unfortunately, this is not true of the field of law

³¹ Although microcards are still in the experimental state of development, certain standards have been accepted by the profession. With some exceptions, the average size of a microcard is 7½ cm. x 12½ cm. (approximately 3" x 5") and is capable of containing as many as 80 pages of material, depending on the size of the book microcarded. It has been determined that a library or collection of printed material in the form of books, periodicals, records, etc., reproduced on microcard, saves over 95% of the physical space occupied by the material reproduced. Microcards are printed on permanent paper stock and their legibility lasts indefinitely. Obvious savings accrue, too, in the binding and storage costs of periodicals.

Microcards are read in microcard readers which can now be found in most libraries of any importance. The latest series of # "6" models are small in overall size, having a screen 10" wide which can project pages as large or larger than the original size of the page reproduced. They can be handled with ease, as they are quite light weight, and they occupy only 10½" x 12" of table space. They can also be tilted by a touch of the hand to desired reading positions.

For general discussion of microcards consult: Fremont Rider, *Microcards and Legal Materials*, 39 *Law Lib. J.* 42-45 (1946); John H. Merryman, *Legal Research Without Books*, 44 *Law Lib. J.* 7-11 (1951); Sidney Teiser, *Law Books of Tomorrow: A Complete Library on a Five-Foot Shelf*, 38 *A.B.A.J.* 378-82 (1952).

where, due to the apathy, or perhaps lack of funds, of many legal institutions, the publisher of microcards for legal literature, Matthew Bender & Co., has been handicapped by lack of their financial support.

The *Microcard Bulletin*, issued by the Microcard Foundation of Middletown, Connecticut,³² contains the *Fourth Annual Consolidated Catalog* of microcard publications.³³ Checking the law publications now available on microcard, we find, in the main, that they consist of state reports prior to the National Reporter System, the *New York Law Journal* from 1948, the *Yale Law Journal* volumes 1-25 and the *Federal Register*.³⁴

Matthew Bender & Co. is presently making available the records and briefs of the United States Supreme Court beginning with the October 1950 term and has recently announced that it is taking subscriptions to a microcard edition of the more important legislative histories of federal acts. The importance of this step cannot be overrated. Many government publications of congressional hearings and reports, as well as bills and drafts thereof, are not available today. Many legislative histories in private hands are incomplete, invariably lacking significant facets of the history. Many are improperly stored due to the variety of sizes and at times the poor paper on which the information is printed. The carefully chosen legislative histories, to be selected by leading law librarians, will facilitate the use of legislative history in the interpretation of federal legislation and will perhaps solve some of the doubts expressed by Mr. Justice Jackson in *United States v. Public Util. Comm'n of Calif.*³⁵

Publications presently under consideration for microcarding, when a sufficient expression of interest is shown, are records and briefs of the New York Court of Appeals and New York Appellate Division of the Supreme Court, and the United States Attorney General's Opinions. These are worthy projects which should be supported by the legal profession.

Other publications on the agenda for early microcarding are:

³² Microcard Bull. No. 11 (Sept. 1953).

³³ The fields of knowledge have been allocated to several publishers. Matthew Bender & Co. is in charge of legal literature. Each microcard publisher selects his own material for reproduction and sets his own price, usually at a cost of about twenty-five cents a card.

³⁴ Matthew Bender & Co. has also arranged for the microcarding of certain historical legal material, which many law libraries have found difficult to procure in the past due to excessive price or unavailability. They are: Felix Liebermann, *Die Gesetze der Angelsachsen* (3 vols., Halle: 1903-1916) (This book has been recognized since its publication as the most authoritative and significant study on Anglo-Saxon law. It contains texts, a dictionary of Anglo-Saxon and Latin words, a subject glossary, introductions to and a commentary on the laws of the period.) Also published has been Benjamin Thorpe, *Ancient Laws and Institutes of England* (2 vols., London: 1841).

³⁵ 345 U.S. 295, 319-21 (1953) (concurring opinion).

Debates of the Warsaw Convention, out-of-print issues of various periodicals, English Reports not in the English Reprints, and Proceedings of the American Bar Association.

VI

INDEX TO LEGAL PERIODICALS

Confession is good for the soul and occasionally self-studies are equally of value. The *Index to Legal Periodicals*, published by the American Association of Law Libraries, needs a self-study to correct some of its inadequacies or it will soon run into rough weather. There have been too many criticisms directed at the *Index* to warrant its apparently smooth sailing. It is indeed fortunate for the *Index* that it lacks competition. Here, too, is another example of the effects of monopoly. It has been said of the *Index*: "It is a good piece of work which could be better; it is a useful job which could be more useful."³⁶ How true is this evaluation? Inasmuch as it is a basic reference tool upon which many researchers are solely dependent for references to legal articles, it will be the purpose of this comment to call attention to some of its inadequacies.

In its present format, the *Index* is developed under four departments as follows: Subject Index, Author Index, Case Index and Book Review Index. The Subject Index is the major part of the *Index* upon which most researchers depend and it lists references to articles, notes and case comments under a subject heading indicating the topic of law treated by the article.

There are several caveats the researcher should note at this point. During the past two years, in order to reduce costs, the editors of the *Index* have imposed a limitation of eighty pages per single bi-monthly issue. This has necessarily entailed a reduction in the number of subject headings assigned to an article. As a matter of fact, it has actually resulted in only one subject heading where the editors consider one sufficient for adequate bibliographical description of the import of an article. The editors admit ruefully that often an article is on more than one point of law and hence there is an inadequate coverage in the subject listing of the *Index*.

The main difficulty with this situation is that the researcher is not aware of the standards of selectivity which route an article to a particular subject heading. The sad fact is that there is none. It depends on the editor's sole and personal choice. Assume there is an article on advertising under the Federal Food, Drug and Cosmetic Law. Would you expect to find it under Food? . . . Drugs? . . . Cos-

³⁶ 39 Law Lib. J. 103 (1946).

metics? All logical choices—but the answer is Advertising and nothing else. This obviously means that the neophyte in the field of Food, Drugs and Cosmetics and perhaps even the expert, not aware of the peculiar legal problems involved in advertising food, drugs and cosmetics and looking only under the headings indicated, would completely miss an article that could be of significance to him in his research.

Then again, the 180 or so legal periodicals considered by the *Index* are not sufficient for the law researcher interested in every article published on his subject. Many nonlegal periodicals carry significant legal articles which do not appear in the *Index* because nonlegal periodicals are not indexed, nor for that matter are many leading foreign legal periodicals. For reference to these articles the researcher must check the *Interim Supplement to the Index to Legal Periodicals*.⁸⁷

Characteristic also of this problem is the disturbing manner in which the *Index* classifies the various surveys of law being published annually. A researcher interested in the development of a legal subject in a specific jurisdiction will not be led to a survey article under the subject listing. For example, the *Annual Survey of California Law*, the *Annual Survey of New Jersey Law*, the *Annual Survey of New York Law*, the *Annual Survey of American Law* contain articles on the present status of the law of California, New Jersey, New York and in the United States generally, by subject, such as, Contracts, Sales, Real Property, etc. As presently indexed these jurisdictional subject articles are not indexed under the subjects of Contracts, Sales, Real Property, etc. Instead, the researcher can only locate these articles under the jurisdictional heading, as California, New Jersey, New York, American Law—and this in a subject index! It is to be doubted if many researchers would think of looking for the contract law of New York or California, or United States generally, under New York, California or American law rather than under Contracts. Certainly many researchers would assume that a search under Contracts would be sufficient. As a result of this situation, it is suspected that the users of the *Index* are not obtaining the service they should rightfully expect.

The *Index* is also to be criticized for the manner in which articles are listed alphabetically under a subject heading. Usually there is a long listing of articles under popular subjects, as Taxation or Labor, with often very little guidance as to the significance of the article other than the information derived from the wording of the title. This

⁸⁷ Published jointly by the law libraries of Columbia and New York Universities, every three weeks.

is due to the lack of adequate subheadings to the broader subject classifications. Therefore, a reference to an unusual or cryptic title will be of little value, as it will be necessary to read the article, a waste of precious time if it does not pertain to the specific aspect of the subject being pursued by the researcher.

The problems of subject headings and indexing are ever with the editorial committee in charge of the *Index*. Each issue is analyzed by it apparently and suggestions sent to the executive editor. It is to be hoped that the committee finds some means to remedy this deplorable situation.

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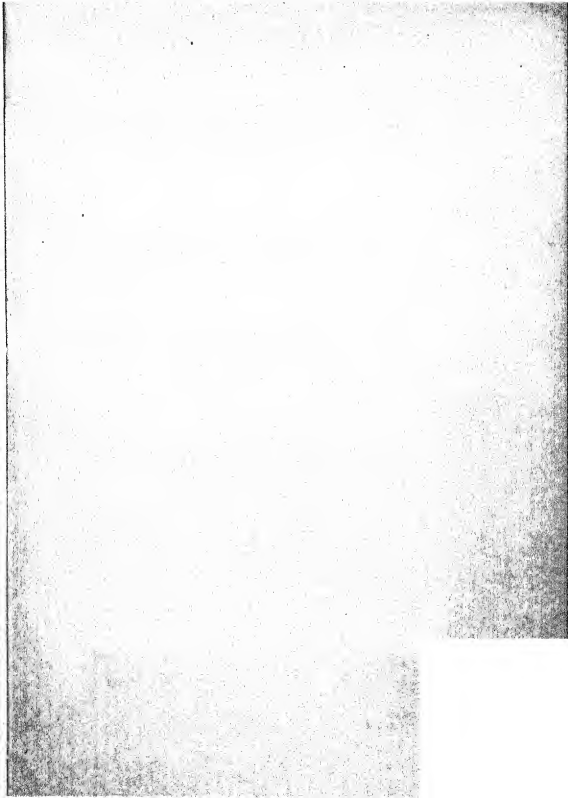
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